Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~75~~-990

JOSEPH N. DAVIES and MURIEL G. DAVIES,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY
and THE DAYTON POWER & LIGHT COMPANY
Respondents,

and

JOHN T. NIEMAN and MARILYN G. NIEMAN,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
THE DAYTON POWER & LIGHT COMPANY,
UNITED STATES FARMERS HOME
ADMINISTRATION,
JENNINGS E. STILES and DOROTHY STILES,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

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Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

This petition seeks review of *The Cincinnati Gas & Electric Company* v. *Davies* and *The Cincinnati Gas & Electric Company* v. *Nieman,* Appeal Nos. 74-10-0086 and 74-10-0087, Court of Appeals, First Appellate District, Butler County, Ohio, reversing Nos. CV74-06-0403 and CV74-06-0404, Court of Common Pleas, Butler County, Ohio. Neither opinion is yet reported. Both are appended hereto.

JURISDICTION

The order sought to be reviewed is dated and was entered by the Court of Appeals of the First Appellate District, Butler County, Ohio, on June 30, 1975. A timely appeal was filed with the Supreme Court of Ohio on July 28, 1975. The Supreme Court of Ohio entered an order refusing to exercise jurisdiction on October 16, 1975.

No order respecting a rehearing nor order extending time within which to petition for certiorari was sought nor granted.

Jurisdiction is conferred upon this Court to review the judgment in question by 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Does Chapter 163 of the Ohio Revised Code, which sets forth the procedures under which all governmental agencies and public and private corporations having the eminent domain power shall take private property in Ohio, and which has been construed by the appellate courts of Ohio to require (1) an expedited trial, (2) placing of the burden of proof on the property owner to show that the appropriation is unnecessary and unauthorized by law, (3) a presumption that the agency or corporation has, as a result of its own determination, the constitutional and statutory right to take the property, and (4) that the property owner be denied the right to discover necessary information from the condemning authority, violate a property owner's right to an opportunity to be heard and present his case in defense of his property as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States?

II. Where a State has provided by statute that a property owner may be involuntarily required to defend his

rights in an eminent domain proceeding in an accelerated trial in which the burden of proving that the corporation having condemning authority has no right to his property is placed upon him, does the due process clause of the Fourteenth Amendment of the Constitution of the United States allow the State to deny him discovery of information necessary to adequately defend his property when that information is solely in the possession of the corporation?

III. Is it an unconstitutional denial of due process of law under the Fourteenth Amendment of the Constitution of the United States for Ohio to empower a private corporation to take private property by making its own private judicial determination that the appropriation is legally necessary and authorized by law, while providing the property owner with no opportunity to prevent the appropriation unless he can prepare for trial within an unreasonably short time without the right to discovery and unless he can establish that the corporation was not merely wrong in determining that the appropriation was necessary and legal, but that the corporation also acted with perversity of will, passion, prejudice, partiality or moral delinquency, or with a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty or some ulterior motive in determining that the appropriation was necessary and legal?

IV. Where, in an action instituted against them in the courts of Ohio by plaintiff utility companies to take power line easements across their property by eminent domain, Petitioners (1) have been forced into an expedited trial, (2) have been saddled with the burden of proving, in defense of their property rights, that the utility companies had no right to the appropriation, and (3) have been denied the right to discover from the utility companies

information known only to the companies and necessary to prove Petitioners' case, and where the trial court has nonetheless granted judgment in favor of Petitioners on the ground that the utility companies concealed vital information until after Petitioners had rested their case, and were therefore guilty of bad faith and an abuse of discretion and therefore had no right to the appropriation, were the Petitioners denied due process of law by the Ohio Court of Appeals when it reversed the trial court and held that Petitioners' burden of proof had not been sustained, and, without remanding the case to provide Petitioners with a real opportunity to defend their rights, entered judgment authorizing the appropriation?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO (1851):

ARTICLE I

§ 19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of

making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO REVISED CODE:

Section 163.05, Ohio Revised Code.
Section 163.08, Ohio Revised Code.
Section 163.09, Ohio Revised Code.
Section 163.10, Ohio Revised Code.
Section 2709.10, Ohio Revised Code (repealed).
Section 4933.15, Ohio Revised Code.

OHIO RULES OF CIVIL PROCEDURE:

Rule 1, Ohio Rules of Civil Procedure.

The complete texts of the above-cited sections of the Ohio Revised Code and rule of the Ohio Rules of Civil Procedure are appended hereto.

STATEMENT OF THE CASE

The questions presented here arise out of condemnation actions instituted by two public utility companies to obtain right-of-way easements for the future construction of high-voltage power transmission lines across land owned by the Petitioners. The questions involve the constitutionality of Ohio law, as construed by the courts of Ohio, which specifies procedures for litigating the right of a condemning authority to appropriate private property when the legality of the appropriation is at issue.

Here the Petitioners challenge the validity, under the due process clause of the Fourteenth Amendment of the Constitution of the United States, of Chapter 163 of the Ohio Revised Code as applied by the trial court and the Court of Appeals to Petitioners below. The trial court below construed the provisions of Chapter 163, Ohio Revised Code, to (1) cast the full burden of proof on the defendant landowners, (2) force them into an expedited trial, and (3) deny them the right to discovery of the facts necessary to prepare their case. Nevertheless, after trial upon the merits, the trial court found that the Petitioners had sustained their burden sufficiently and granted judgment in their favor. The Court of Appeals, however, gave much greater weight than did the trial court to the presumption of legality of the private decision of the utility companies to appropriate the property, and it reversed the judgment, holding that the burden of proof was greater than that sustained by Petitioners. At the same time, the Court of Appeals affirmed the constitutionality of the statutes and the procedures applied by the trial court,[1] holding

[1] Chapter 163 (§§ 163.01 through 163.22, inclusive) of the Ohio Revised Code is known in Ohio as the Uniform Eminent Domain Act. But it is not, as that label implies, uniform among the states nor patterned after a model act in any sense. It was enacted in 1965 by the Ohio General Assembly to simplify the procedures for condemning authorities to take private property, replacing with a single set of procedures the many separate statutes applicable to condemnation actions of utility companies, railroads, municipal corporations and agencies of the state and local governments. Many of these prior acts contained provisions for expedited trials. A few contained restrictions on discovery. But not until Chapter 163 became the law of Ohio on January 1, 1966, had the expedited trial and limitation on discovery been combined with a requirement that the burden of proof be placed entirely upon the defendant landowner in defending against the right of the condemning authority to take his property. And not since January 1, 1966, in any case in which Chapter 163 has been followed, has any landowner succeeded in successfully defending an appropriation action. There are no Ohio cases reported since 1965 where the property owner has ultimately prevailed against any condemning authority on the right to take his property in an eminent domain action.

that neither expedited trial nor the burden of proof denied due process, and that denial of discovery presented no constitutional question.

Pre-Trial Proceedings

On June 18, 1974, the Respondent utility companies[2] filed complaints in the Court of Common Pleas of Butler County, Ohio to secure right-of-way easements across the property of Petitioners. The complaints were filed in accordance with the provisions of § 163.05, Ohio Revised Code.

Petitioners filed answers to the complaints on July 5, 1974, as required by § 163.08, Ohio Revised Code. In their answers they challenged the right of the Respondent utility companies to take the easements. Specifically, Petitioners alleged that the appropriations were not necessary to serve any purpose for which eminent domain powers could be legally used, and would be detrimental to the public welfare and in violation of Article I, § 19 of the Ohio Constitution, being particularly damaging to the

[2] The Respondents, The Cincinnati Gas & Electric Company and Dayton Power & Light Company, were the Plaintiffs in the trial court. Both are private corporations for profit incorporated under the laws of the State of Ohio to provide electric and natural gas service to the public. As utility companies, they are empowered by the State to take private property by eminent domain under § 4933.15, Ohio Revised Code. The other Respondents are the United States Farmers Home Administration, Jennings E. Stiles, and Dorothy Stiles. The Respondent United States Farmers Home Administration, an agency of the federal government, was joined by the plaintiffs as a defendant as the mortgagee of Petitioners John T. and Marilyn G. Nieman. Respondents Jennings E. and Dorothy Stiles are owners of land adjacent that of Petitioners and moved to intervene; their motion was denied by the trial court and the denial was affirmed by the Court of Appeals.

rural residential environment in which they lived. The utility companies admitted, as the Court of Appeals below recognized in its opinion, that these appropriations were in part the result of a decision by the utility companies to secure rights-of-way for future construction before the environmental standards of the new Ohio Power Siting Act[3] would take effect.

Shortly after the filing of the answers, the utility companies, on July 22, 1974, filed this motion:

> "Plaintiffs move the Court for an order setting the case for hearing before the Court pursuant to the provisions of § 163.09 ORC, which requires a hearing by the Court 'not less than five (5) nor more than fifteen (15) days from the date the Defendants' answer was filed * * *.'
>
> "The Plaintiffs further move the Court for an order holding that the Defendants are not entitled to discovery as requested by Defendants' counsel."

This motion was granted by the trial court. On the authority of § 163.09, Ohio Revised Code, the Court set the case down for trial on the merits at the next available trial date, which was August 27, 1974. On August 9, 1974, on authority of § 163.10, Ohio Revised Code, the trial court also entered an order (appended hereto) limiting discovery to the taking of depositions, but the Court dis-

[3] The Ohio Power Siting Act, § 4906.05, Ohio Revised Code, would become effective on October 23, 1974. Nonetheless, even before its effective date, it is regarded as a declaration by the Ohio General Assembly of the public welfare within the meaning of Article I, § 19 of the Ohio Constitution, which, in essence, protects private property from appropriation unless the appropriations are consistent with the public welfare. *Citizens Committee to Preserve Our Scenic and Historic Area, et al.* v. *Dayton Power & Light Co., et al.*, —— OhioApp.2d ——, First Appellate District of Ohio, No. CA74-06-0055 (June 16, 1975).

allowed the taking of the depositions of the directors of the plaintiff utility companies who approved the resolutions to appropriate the property of Petitioners. Section 163.09 (B), Ohio Revised Code, makes these resolutions alone a prima facie case for the companies, and casts the burden of proof upon the defendant property owners to establish that the appropriations are not necessary.

Notwithstanding the order limiting discovery, Petitioners served upon the utility companies two requests for admissions and one request for production of documents. The companies made some admissions and voluntarily produced some documents, but objected to the remainder of the requests. One critical document that the companies refused to produce was an environmental consultant's report commissioned in January, 1974, which contained vital information the Petitioners were not to learn until the end of the trial. Much of the contents of this report conflicted with other information made available to Petitioners, including information on the true route of the proposed transmission line.

In August of 1974, the Petitioners filed two motions. The first was a motion for an order compelling discovery. This was never ruled on by the trial court. The second was a motion for summary judgment asking the Court to declare unconstitutional the provisions of Chapter 163 which required an instant trial on the merits and placed the burden of proof on the defending landowners without access to the evidence necessary to meet that burden. Petitioners claimed that those provisions violated the due process clauses of Article I, § 16 of the Constitution of Ohio and the Fourteenth Amendment of the Constitution of the United States. The trial court denied this motion for summary judgment from the bench at the outset of

the trial. Thereupon, counsel for Petitioners filed an affidavit stating that the pretrial rulings of the trial court under Chapter 163 of the Ohio Revised Code denied him the opportunity to adequately prepare the case for the Petitioners. At the end of the trial, the trial court incorporated into its final judgment entry its ruling denying the motion for summary judgment and declared the statute and the procedures followed by the trial court to be constitutional.

Proceedings on the Merits

Petitioners strenuously argued to the trial court and to the Court of Appeals that the presentation of their case on the merits was so adversely affected by the trial court's rulings pursuant to Chapter 163, Ohio Revised Code, that they were denied due process of law. Petitioners complained that being saddled with the burden of proving complicated and highly technical factual issues, being denied the means to obtain information necessary to try those issues, and being forced into trial in a time too short to prepare to try even a case of modest complexity gave them no real opportunity to defend their rights.

But while the trial court refused to upset the procedures authorized by the Ohio General Assembly and the right of the utility companies to use them, it accepted the manner in which they were used as factual evidence of the companies' bad faith and abuse of discretion.

Entering judgment in favor of the Petitioner-landowners on the narrow findings that the utility companies were guilty of bad faith and an abuse of discretion in concealing the true route of the line and their environmental impact report until after the Petitioners had rested their case, the trial court announced that "[w]ith the awesome

right to exercise the power of Eminent Domain goes the responsibility to keep the landowners affected informed." But the Court of Appeals reversed, holding that Petitioners' case was insufficient to meet the burden cast upon them by Ohio law and was insufficient to sustain the findings of the trial court.

This burden of proof was thrust upon the landowners very early in the trial. The utility companies, as plaintiffs, opened the trial, put on testimony that they were unable to agree with the Petitioners on the value of the easements, introduced the resolutions of their boards of directors that the companies needed the easements, relied upon the language of § 163.09 (B), Ohio Revised Code, that "* * * the burden of proof is upon the owner. A resolution * * * of the * * * board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity," and rested. Petitioners moved for judgment at this point on the ground that the burden should be on the utility companies and had not been met, but the trial court denied the motion.

Without the benefit of depositions of the members of the boards of directors who adopted the resolutions upon which the utility companies had relied for their prima facie case, the Petitioners called these members for the first time at trial as upon cross-examination. It was established that the boards had no knowledge of how the route for the line was selected or whether or not environmental studies had been made, but that the boards assumed that management and engineering personnel had done whatever was required of them.

Then, having plotted on a map the route of the trans-

mission line from information obtained by interviewing other property owners to determine which had been contacted by the right-of-way agents of the companies,[4] Petitioners submitted evidence to show that the proposed line would be harmful to the public welfare. Serious environmental defects of the proposed line were revealed by the expert testimony of an architectural historian and a member of the Ohio Power Siting Commission. The trial court found "evidence showed that the Board was not made aware of the fact that the proposed route was directly over two historically registered sites (The Cochran and Burwinkle farms) nor were they made aware of other natural or other improved areas (Girl Scout Camp) ([Petitioner] Nieman's Camp of America Camp Ground, etc.) that were to be crossed." "There is no question in this court's mind that the tried and true geometric proposition of 'the shortest distance between two points is a straight line' was applied to the drawing boards since quite logically, cost is and was of the utmost consideration."

The Petitioners further attempted to disprove the presumption that the proposed transmission line, designed to transmit 200 million watts of bulk power long distances, was necessary to serve the public within the service areas of these companies so as to entitle these companies to use the power of eminent domain. Petitioners claimed the line served instead business objectives of the companies unrelated to the interests of the public. Petitioners tried to prove that the utility companies' desire to secure the route was motivated not only by the advantage of obtaining additional rights-of-way before the Ohio Power Siting

[4] The companies' engineers, on cross-examination in depositions, confirmed that this route was correct. On cross-examination at trial they again confirmed the route was correct except for minor changes.

Act would make it more difficult for them to do so (as the courts below recognized), but because declining demand for power made it desirable for the companies to sell bulk power to other companies to, on one hand, compensate for over-expansion of the companies' generating facilities as a result of over-optimistic demand forecasts, and, on the other hand, to satisfy shareholder expectation of a promised seven percent annual growth rate.

The only evidence that Petitioners were able to discover and admit on this point was sufficient to raise inferences, but insufficient, as the courts below found, to sustain the statutory burden of proof that the line was unnecessary. The utility companies testified only that the line was necessary on the basis of earlier five- and ten-year load forecasts which showed that demand was expected to increase at a rate of seven percent per year. The company witnesses did disclose on cross-examination that their highest peak demands had occurred more than a year before, that it was less than seventy percent of their generating capacity, and that more generators were under construction which would substantially increase their generating capacity even further. The actual decreasing demand trend was concealed by the companies until after trial.

Neither did the companies disclose the ultimate destination of the power to be transmitted over the proposed line. The witnesses of the Cincinnati Gas & Electric Company stated generally that it had existing substantions along the proposed route and that a new substation was planned near the end of the line, but evidence revealed that the line crossed only undeveloped rural property, that none of the existing substations were capable of tying into 345,000-volt power, that the companies' latest ten-year forecast which included the proposed transmission line con-

tained no reference at all to any substation near the terminus of the proposed line, and that the line would connect to other lines capable of carrying all of the power northward out of the Cincinnati Gas & Electric Company's service area.[5] The trial court found that Petitioners had failed to sustain their burden of proving that the line was unnecessary to the duties of the utility companies in providing power to the public within their service areas.

It was not until after the Petitioners had rested their case that the utility companies, in rebuttal, revealed information that the Petitioners had sought but had been denied. In direct testimony, the company engineers then revealed in detail the route of the line. Most incredibly, it was revealed that the route was drastically altered during the trial: sixty-one percent of it had been moved, and fifty percent of the line was now routed over the land of different property owners.[6] The portions of the line Petitioners had spent their limited time and resources to prove were in derogation of the public welfare had been by-passed. As a result, the chief factual issue before the trial court changed. Whether easements on Petitioners' land for a transmission line which would not connect to a generator or to a destination without violating the public welfare clause of the Ohio Constitution could be legally

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[5] There was no proof of any planned or forecast development in the vicinity of the line, but it was established that the Cincinnati Gas & Electric Company, through a subsidiary, owned several thousand acres of unimproved but developable real estate near the end of the proposed line.

[6] This change was, among other things, contrary to prior testimony by the companies that the earlier designated route for the line had been: "* * * finally and permanently determined. We have the best route for that," and that this "final" determination had been made "possibly six to eight weeks ago." Six days after that testimony, after the Petitioners had rested their case, the companies altered almost two-thirds of that line.

necessary was no longer the question. Instead, the question became: whether the trial court could find a transmission line on Petitioners' property legally necessary where the essential segments connecting it to a generator and destination were not covered by the resolutions of the companies' boards which made the companies' prima facie case of necessity. The trial court had no difficulty with this issue: "If this court allows the appropriation, in effect it is this court that is approving the route in its final form, not the CG&E Board of Directors. This Court thinks that would be an abuse of discretion!" The utility companies argued that their consultants' report, revealed for the first time at this point in the trial, proved that the new portions of the route satisfied all standards. But it had never been presented to the companies' boards of directors, and the trial court found that concealing this report on the route changes from the boards of directors and the landowners was bad faith and an abuse of discretion sufficient to support judgment for the Petitioners.

The Court of Appeals, however, reversed the judgment of the trial court and held that conduct of the utility companies did not sustain Petitioners' burden of proof of bad faith or an abuse of agency discretion. The Court of Appeals tacitly assumed that the companies' prima facie case was not diluted by the route changes which departed from the route that was before the boards when passing the resolution.

Proceedings on Appeal on Constitutional Questions

By way of cross-appeal in the Court of Appeals, Petitioners pursued their claim that the rulings of the trial court in applying the provisions of Chapter 163 of the Ohio Revised Code denied them due process of law. Petitioners

reasserted their claims that the burden of proof, denial of discovery and accelerated trial denied them the opportunity to adequately protect their rights, the same issues raised by them in their motion for summary judgment in the trial court. These issues were presented to the Court of Appeals by assignments of error[7] which the Court of Appeals took to be the following:

> "I. Chapter 163 of the Ohio Revised Code is an unconstitutional attempt of the Ohio Legislature to repeal the law of the land as it pertains to appropriation proceedings and purports to establish a procedure whereby private property may be appropriated without providing the due process of law to the property owner.
>
> "II. The provisions of Chapter 163, Ohio Revised Code, violate the most elemental notions of what constitutes due process in an appropriation of private property context.

[7] The Court of Appeals ruled on section headings in Petitioners' brief rather than on the actual "Assignments of Error," which read as follows:

> "I. The trial court erred in denying the Defendants' motion for summary judgment for the reason that Chapter 163 of the Ohio Revised Code is unconstitutional in that it purports to establish a procedure whereby private property may be appropriated without providing the due process of law to the property owner.
>
> "II. The trial court erred in ruling that Chapter 163 of the Ohio Revised Code provides due process to the property owner in an eminent domain proceeding.
>
> "III. The trial court erred in ruling that the discovery provisions of the Ohio Rules of Civil Procedure are inapplicable to eminent domain proceedings.
>
> "IV. The trial court erred in failing to rule upon the Defendants' motions pertaining to discovery.
>
> "V. The trial court erred in setting a trial date of August 29, 1974 and thereby deprived the property owners of due process and prohibited them from adequately preparing their case."

> "III. The Court of Common Pleas erred in ruling that the Defendants were not entitled to adequately prepare their case in accordance with the discovery provisions of the Ohio Rules of Civil Procedure.
>
> "IV. The failure of the Court of Common Pleas to rule upon the Defendants' motions pertaining to discovery constituted a denial to the Defendants of the due process of the law and deprived them of an opportunity to adequately prepare and present their case on the merits.
>
> "V. The ruling by the Court of Common Pleas setting a trial date of August 29, 1974 constituted an unconstitutional deprivation of due process and prohibited the Defendants from adequately preparing their case.
>
> "VI. The provisions of § 163.09, Ohio Revised Code, unconstitutionally placed upon these Defendants the burden of proving the negative of a proposition, concerning which all of the relevant facts were in the possession of the Plaintiffs."

With respect to Issues I and II, the Court of Appeals held the following:

> "With respect to the timetable for preparation and trial of appropriation cases, who is to say what is a reasonable time to prepare and try the case? That duty falls on the General Assembly. In these cases we hold that defendants had an opportunity to be heard and that the proceedings were adequate to safeguard their rights. There was no violation of defendants' due process rights. Assignments I and II are overruled."

On similar grounds applied to Issues I and II, the Court of Appeals rejected Issue V.

With respect to the issues claiming Petitioners were unconstitutionally deprived of discovery, the Court of

Appeals affirmed the trial court's conclusion that § 163.10, Ohio Revised Code, and Rule 1 (C), Ohio Rules of Civil Procedure, limit discovery in condemnation cases. As to the constitutionality of this, the Court of Appeals held:

> "This is a procedural matter, established by the legislature and discovery gives rise to no constitutional question. The failure of the court to rule on subsequent motions for discovery amounted to a denial of the motions, but under the circumstances we find no denial of due process and Assignments III and IV are denied."

With respect to Issue VI, relating to the burden of proof, the Court of Appeals said only:

> "In defendants' final Assignment of Error No. VI, it is claimed that placing the burden on the property owners to prove lack of necessity for the line, was unconstitutional. Prior to the passage of Chapter 163 the burden was on the corporation to prove necessity.
>
> " 'The General Assembly of this state has authority to prescribe the circumstances that shall constitute prima facie evidence of a fact in issue in an action on trial in the courts of this state, whether the cause of action to which it relates arose within or without the territorial limits of the state.'
>
> *"The Pennsylvania Co.* v. *McCann*
> 54 Ohio St. 10
>
> *"Ohio Power Co.* v. *Diller*
> 18 Ohio App.2d 167"

From the above holdings of the Court of Appeals, the Petitioners filed a timely motion asking the Supreme Court of Ohio to take jurisdiction of the case. To the Supreme Court of Ohio the Petitioners presented the following five propositions, of which propositions III, IV and V contain the constitutional questions:

"Proposition of Law No. 1:

A public utility company which actively conceals from affected property owners the decision to build a high-voltage transmission line across their property, and which refuses, after repeated requests, to disclose to them the route for the proposed transmission line, and which refuses to communicate with representatives of the community, and which begrudgingly and insufficiently considers factors affecting the general welfare of the citizens of the area only after the citizens have become outraged to the point of litigation, has acted in bad faith."

"Proposition of Law No. 2:

A holding by the Court of Appeals that an easement for a transmission line segment across a particular property can be legally necessary without such segment being connectable to any source of power or destination through any principal corridor which can be lawfully acquired, is contrary to logic and an error of law."

"Proposition of Law No. 3:

When a trial court concludes that a transmission line route which crosses Defendants' property cannot be construed as proposed at time of commencement of a condemnation trial without violating the public interest as prohibited by Article I, § 19 of the Ohio Constitution, a judgment by a Court of Appeals reversing the trial court on the basis that a new route suggested by the utilities in their rebuttal case but not tried by the trial court might serve the public welfare, is in error and cannot be supported without a trial on the new route; and by reversing the trial court and concluding that the proposed new route demonstrated the utilities' good faith and concern for the public welfare without giving the property owners the opportunity to test the facts of the new route, the Court of Appeals denied the property owners due process of law."

"Proposition of Law No. 4:

A judgment of a trial court should not be disturbed on the basis that it is contrary to the evidence or unsupported by the evidence or against the weight of the evidence unless such fact appears manifestly and clearly in the record; and when the Court of Appeals went beyond the record and substituted its own opinions on the facts and inferences to be drawn from the facts for those conclusions which the trial court drew from observing the conduct of the parties and the demeanor of the witnesses at trial, to find that the utility companies had acted in bad faith and abused their discretion, the Court of Appeals committed error and also denied the property owners due process of law."

"Proposition of Law No. 5:

It is an unconstitutional denial of due process to apply Chapter 163, O.R.C., to place the full burden of proof on property owners challenging a utility company's right to take easements and at the same time to force the property owners to undergo an expedited trial and be denied the full rights to discovery of essential facts which only the condemning utility company has, and then for a Court of Appeals to reverse a trial court's judgment for the property owners on the resulting record; and if Chapter 163, O.R.C. requires such application, it is unconstitutional on its face."

On October 16, 1975, the Supreme Court of Ohio declined jurisdiction, letting the judgment of the Court of Appeals of the First Appellate District of Ohio below stand on the merits of this action, on which decision a writ of certiorari to that court is herein sought.

REASONS TO ALLOW WRIT

This petition asks this Court to review the constitutionality of the statutory procedures now applicable to all actions for the taking of private property by eminent domain in Ohio. Petitioners contend that these procedures allow, and indeed require, that private property be so taken without due process of law as that concept has been construed by applicable decisions of this Court under the Fourteenth Amendment of the Constitution of the United States. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965); *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1952); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930).

These procedures are particularly ripe for review by this Court at this time because the judgment of the Court of Appeals of Ohio below reversed the only judgment of a trial court in favor of a private property owner in an appropriation case tried in compliance with Chapter 163 of the Ohio Revised Code, still standing in Ohio, since the enactment of that Chapter by the Ohio General Assembly in 1965.

The main impact of Chapter 163, Ohio Revised Code, is the provision in § 163.09 (B) which shifts the burden of proof in all eminent domain proceedings to the defending property owner. In a series of cases leading up to and including the present case, the provisions of that chapter requiring expedited answer and trial have been construed as mandatory. *Toledo* v. *Custer,* 24 Ohio St.2d 152 (1970); *Cincinnati* v. *Bossert Machine Co.,* 16 Ohio St.2d 76 (1968).

Similarly, in decisions prior to and including the decision of the Court of Appeals below, the Ohio Courts of Appeals have construed the burden which the property

owner must meet, in proving the right to take lacking, to be proof of abuse of discretion as defined under Ohio law. Thus, it is as difficult to defeat a self-serving ex-parte decision of the private corporation with condemning authority that it has the constitutional and statutory right to take one's property as it is to reverse an appeal of a discretionary ruling of a trial court arrived at in a due process adversary hearing. See, *Cleveland Electric Illuminating Co.* v. *Lesher,* — Ohio App. — (1975), Eighth Appellate District of Ohio, No. 33989.

The decision of the Ohio Court of Appeals below closed the last door of a property owner in defending his property in the courts of Ohio when it was held that not only are the provisions in Ohio law requiring expedited trial and nearly insurmountable burden of proof on the defendant constitutional, but that discovery of the essential evidence by the property owner may be denied him by the trial court and presents, even under the circumstances which Ohio has imposed, no constitutional question.

The present case is a particularly outrageous example of the full impact of Ohio law on the property owner. For the rulings of the trial court accelerating trial with the burden of proof on the property owner and limiting the property owner's right to discovery were solicited by the utility companies under authority of Ohio law. And it was through abuse of these rulings that the utility companies successfully concealed material evidence from the property owners and even misled them on the location of the power line to be constructed to cause the property owners to expend what little time and resources they had on irrelevant data. So outrageous was the utility companies' conduct that the trial judge, while refusing to rule the Ohio statutory procedures unconstitutional, held that

the introduction in rebuttal of surprise evidence of their plans by the utility companies, evidence which contradicted their own prior disclosures, amounted to such an abuse of these procedures so as to constitute a factual case for the property owners of abuse of discretion by the companies. But the Court of Appeals held that Ohio law required approval of the taking of Petitioners' property notwithstanding the companies' conduct or the limitations on the opportunities of the property owners to defend.

The right to discovery in proceedings in state courts in circumstances such as this has not yet been decided by this Court.

Appropriation of Property in Ohio

Ohio has, through a series of judicial decisions construing its eminent domain laws, made it virtually impossible for private property owners to challenge in the courts of Ohio the right of any condemning authority to take their property.

In 1965, the Ohio General Assembly enacted Chapter 163 of the Ohio Revised Code, establishing procedures applicable to all appropriation actions in the courts of Ohio instituted by all private corporations or public agencies possessed with powers of eminent domain. So devastating has been the effect of this chapter on the property owners of Ohio that in no cases reported in Ohio since the enactment of this law in 1965 has a property owner ultimately prevailed.[8]

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[8] In the single reported case of *Cleveland Electric Illuminating Co.* v. *Scapell,* 44 Ohio App.2d 13 (1975), affirming 41 Ohio Misc. 107 (1975), motion to certify overruled by Supreme Court of Ohio, June 27, 1975, the condemning authority was denied the right to appropriate property. But this case, in which the cities of Independence and

The relevant portions of Chapter 163 are the following:

1. **Answer time:** Section 163.08, Ohio Revised Code, requires that a property owner's answer to a petition to appropriate his property "be filed on or before the third Saturday after the return day of the summons * * *. No extension of time for filing of an answer shall be granted."

2. **Expedited trial:** Section 163.09(B), Ohio Revised Code, requires that trial on the question of the condemning authority's right to appropriate the property commence "not less than five nor more than fifteen days from the date the answer was filed."

3. **Burden of proof:** Section 163.09(B), Ohio Revised Code, further requires that upon questions of the condemning authority's right to appropriate the property, "the burden of proof is upon the owner."

4. **Presumption against property owner:** Section 163.09 (B), Ohio Revised Code, also requires that "a resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation, shall be prima facie evidence of such necessity in absence of proof showing abuse of discretion by the agency in determining such necessity."

5. **Limitation on discovery:** § 163.10 limits discovery available to the property owner to depositions, and only depositions of "officers, agents or employees of the agencies," but not including depositions of the directors who passed the resolution set forth in subparagraph 4 above.

Brecksville, Ohio and the Ohio Department of Natural Resources joined to oppose the appropriation, was not decided under Chapter 163, but was decided on the basis that § 4905.65(B), Ohio Revised Code, gave local authorities the power to regulate power line construction in the Federal-State-Metropolitan Park District through which the right-of-way was to run.

While the above-cited statutes may have been amenable to construction and application in a manner consistent with the due process requirements of the Fourteenth Amendment of the Constitution of the United States, Ohio appellate court decisions, culminating in the decision of the Court below, have eliminated the last vestige of constitutionality of appropriation actions in Ohio.

Initially, it was held that the deadline in filing an answer required by § 163.08, Ohio Revised Code, could be extended by a trial court when justice required and that failure of a trial court to do so denied the property owner due process of law. *Cincinnati* v. *Bossert Machine Co.*, 14 Ohio App.2d 35 (1968). The Supreme Court of Ohio, however, disagreed and reversed. 16 Ohio St.2d 76 (1968). See also, *Toledo* v. *Custer*, 24 Ohio St.2d 152 (1970).

The statutory requirement of § 163.09 (B), Ohio Revised Code, for expedited trial was at first ignored by many trial courts. Petitioners' counsel's affidavit in the trial court stated that he had participated in fifteen such actions in Hamilton County (Cincinnati), Ohio, and that in no case was trial required sooner than a year from the filing of the answer. In some of these cases (unreported), the property owners successfully proved that the condemning authority had no right to the appropriations sought. But when the trial court below required commencement of the trial at the earliest available date (fifty-three days from the filing of the answer) on authority of § 163.09 (B), Ohio Revised Code, the Ohio Court of Appeals affirmed the constitutionality of the requirement.[9]

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[9] On appeal by the utility companies in this case, the Court of Appeals below granted to the utility companies additional time, a total of sixty days, to file their appellants' brief. This was in response to

The provision of § 163.09 (B) placing the burden of proof on defending property owners was also recognized as of dubious constitutionality initially. This Court has held that the placing of the burden of proof on one defending his rights can in some circumstances result in a denial of due process of law, *Armstrong* v. *Manzo,* 380 U.S. 545 (1965). Accordingly, one Ohio trial court, in *Toledo Edison Co.* v. *Harrison Marina, Inc.,* 44 Ohio Op. 2d 224 (1968), declared that placing the burden in an appropriation action on a defendant property owner as required by § 163.09 (B), Ohio Revised Code, would deny him due process of law; whereupon, the plaintiff utility company went on to sustain its burden of proof. The Ohio Court of Appeals below rejected this view, however, holding that the Ohio General Assembly has the power to direct that the burden be placed on defendants in an action such as this.

Compounding the property owners' burden, the courts of Ohio have given to plaintiffs possessed with eminent domain power a prima facie case so strong that it is virtually impossible to overcome. The property owners must prove, in order to meet their burden, not just that the appropriation is necessary, but that the utility companies' boards of directors abused their discretion in determining that the appropriation was necessary. In Ohio, a finding of "abuse of discretion," as the Court below held, requires proof by the property owner that the utility company's board acted with "perversity of will, passion, prejudice, partiality or moral delinquency," citing the Ohio Supreme Court in *Alliance* v. *Joyce,* 49 Ohio St. 7, 22 (1892).

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a request by the companies urging that additional time was necessary because "the issues in the case are complex and have required a substantial amount of time on the part of the Appellants [utility companies] to prepare said brief."

It might have been expected that, in view of the severe time limitations and the virtually impossible burden cast upon the property owners by the courts of Ohio, that these property owners would at least have been given access to the facts and evidence necessary to prepare their case. Instead, the trial court below construed § 163.10, Ohio Revised Code, as limiting the rights of the property owners to discovery. The property owners were permitted only to take the depositions of utility company employees. The trial court declined to rule on requests for admissions and documents needed by the property owners. With this, the utility companies created a device to conceal from the property owners all of the critical evidence of the case. Although they identified a comprehensive environmental study which was in preparation by consultants eight months prior to trial, they refused to produce this document on the ground that it was work product prepared in anticipation of litigation. It included information the companies would not disclose through any other source, such as the actual route of the transmission line, and the fact that the route approved by the boards of directors was environmentally defective over sixty-one percent of its length. The companies made available to Petitioners obsolete load forecasts showing projected demand increases suggesting additional distribution facilities necessary, but did not make available sufficient data showing actual declining demands to enable Petitioners to prove the forecasts were erroneous.

The trial court did, however, find this tactic of concealing material facts from the property owners as well as from the companies' own boards of directors as a demonstration of bad faith and abuse of discretion by the companies warranting judgment for the property owners. But the Court of Appeals approved of this device by the com-

panies and reversed the trial court, constituting a further denial of due process to the property owners in a manner condemned by this Court in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930).

Denial of Due Process of Law

From the origins of our system of law, private property has been protected from being taken by the powers of the sovereign. Article 39 of the Magna Carta (1215) provided in that that no man be deprived of his freehold unless by the lawful judgment of his peers and by the law of the land. This protection is embodied in the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States. And while personal and criminal rights have received much recent judicial attention, the protection of property rights by due process of law has been reaffirmed by this Court. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). But in the State of Ohio, the most fundamental elements of due process do not apply to the taking of private property by corporations granted eminent domain power by the State.

In a series of judicial decisions by the appellate courts of Ohio, culminating in the decision of the Court of Appeals below, a private determination by a corporation for profit, possessed with eminent domain power under the laws of Ohio, that it wants the private property of a landowner in that state, is in reality conclusive in the courts of Ohio on the right of such corporation to take the property it desires.

This Court has recognized that an adequate opportunity for one whose rights are in jeopardy to defend those rights is fundamental to the concept of due process of law:

> "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 171-72 (1952), separate concurring opinion of Mr. Justice Frankfurter.

It has been recognized by this Court that giving priority to speed in judicial proceedings can go astray of constitutional standards. *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). It is submitted that Ohio's requirement set forth in § 163.09 (B), Ohio Revised Code, that trial in appropriation cases must above all other considerations proceed most expeditiously is inconsistent with the decisions of this Court.

Further, it is submitted that placing the burden of proof on defendants in protecting property rights, particularly when little opportunity is provided them to prepare a defense, is most inconsistent with this Court's holdings.

> "For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser* v. *Randall,* 357 U.S. 513, 515, 2 L.Ed.2d 1460, 1472, 78 S.Ct. 1332. Yet those burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.
>
> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385, 58 L.Ed. 1363, 1369, 34 S.Ct. 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 551-552 (1965).

And where, as under Ohio law, the burden imposed is to overcome a virtually conclusive presumption arising out of a subjective determination of one's adversary, it is

submitted that the opportunity to be heard is illusory, and that the proceedings under Chapter 163, Ohio Revised Code, provide, at most, only the appearance that due process is afforded by merely affixing the stamp of a court of law, as a judicial imprimatur, to a resolution of a private company to take a person's property. And where the Court of Appeals below reversed the trial court's judgment for Petitioners articulating a greater burden than the trial court imposed, deprivation of Petitioners' property was finally accomplished without providing them any real opportunity to defend against the exaction. Whether the result be required by the enactment of Chapter 163 by the legislature of Ohio, or by the Court of Appeals of Ohio in construing otherwise valid state statutes, the transgression of the due process clause of the Fourteenth Amendment is nonetheless clear. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930).

Furthermore, under the circumstances of this case, where an onerous burden of proof is cast upon property owners in defending their rights in the face of expedited proceedings where the relevant information is in the sole possession of utility companies seeking the right to take Petitioners' property, it is submitted that denial of the right to discovery denies Petitioners due process of law. The Ohio Court of Appeals below held that discovery presents no constitutional issue. This holding presents an important question of law not yet decided by this Court, which it is believed should be resolved.

SUMMARY

At issue in this case is the constitutionality of a comprehensive statutory scheme providing for the appropriation of private property in the state of Ohio. The constitutionality of some provisions of Chapter 163, Ohio Revised Code, have been upheld separately in the courts of Ohio, but the Court below has held that expedited trial, placing a burden of proof on a defendant property owner and denial of the right to discovery do not individually or cumulatively violate the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Court below has upheld a strict construction of Ohio law which will severely limit the ability of any property owner to challenge the legality of a taking of his property by eminent domain in Ohio.

In construing Ohio law and upholding its constitutionality, the Court of Appeals below has in effect eliminated the right to any real judicial review of the appropriation of private property in the courts of Ohio. On both factual and legal questions, even constitutional questions, relating to the right of a corporation to take property by eminent domain, a biased decision of the self-interested corporation was given greater weight than the judgment of the trial court being reviewed.

It is submitted that only review by this Court of the judgment of the Court of Appeals of the First Appellate District of Ohio rendered in this action can bring Ohio's procedures for the appropriation of private property in accord with due process of law guaranteed to owners of private property under the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, it is respectfully requested that a writ of certiorari be granted on this petition.

Respectfully submitted,

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APPENDIX

STATE OF OHIO,
BUTLER COUNTY COURT OF COMMON PLEAS

No. CV74-06-0403

THE CINCINNATI GAS & ELECTRIC COMPANY, et al,
Plaintiffs,
v.
JOSEPH N. DAVIES, et al,
Defendants.

and

No. CV74-06-0404

THE CINCINNATI GAS & ELECTRIC COMPANY, et al,
Plaintiffs,
v.
JOHN T. NIEMAN, et al,
Defendants.

OPINION AND ENTRY

August 9, 1974

MARRS, J.

This matter coming on for hearing on defendants motion for a ruling on discovery, it is the finding of this court

that under Rule 1, Paragraph C, the rules of discovery are not applicable in the appropriation of property. The legislature has spoken specifically in Chapter 163 O.R.C. as to matters and conduct of trial in the appropriation of property. Section 163.10 provides: "Deposition of the officers, agents, or employees shall be taken as on cross examination." This court would limit discovery to the aforesaid individuals.

The court in making its ruling would also comment that the directors of the respective corporations should not be made available for discovery since whatever action the respective Boards of Directors made, resulted in individual judgments by the Directors on materials available to them. These same materials can be ascertained by discovery through the respective officers and employees of the corporations and this in turn would be in conformity with Section 163.10.

Defendants discovery is limited by Section 163.10 O.R.C.

STATE OF OHIO,
BUTLER COUNTY COURT OF COMMON PLEAS

No. CV74-06-0403

CINCINNATI GAS & ELECTRIC COMPANY, et al,

Plaintiffs,

v.

JOSEPH N. DAVIES, et al,

Defendants.

and

No. CV74-06-0404

CINCINNATI GAS & ELECTRIC COMPANY, et al,

Plaintiffs,

v.

JOHN T. NIEMAN, et al,

Defendants.

OPINION AND JUDGMENT ENTRY

September 26, 1974

MARRS, J.

This matter coming on for hearing before the court on the pleadings, evidence, arguments and briefs of counsel in the appropriation of private property of the defendant landowners by the plaintiff utility companies under the right of eminent domain pursuant to Section 163.00 O.R.C.

The evidence reveals that on May 16, 1974 the Cincinnati Gas & Electric Board of Directors adopted a resolution of necessity to proceed by the exercise of the power of eminent domain to acquire easements over the defendants properties in order to meet its duty to serve the public by providing electricity. A similar resolution was passed on July 26, 1974 by the Board of Directors of Dayton Power & Light.

Testimony from the Directors of Dayton Power & Light, in person and by deposition, indicated their study of the need for the line but the details of construction, routing, etc., were left to the Cincinnati Gas & Electric agency as the latter owned 64% of the line with only 36% ownership in Dayton Power & Light. Evidence from the CG&E Directors and officers, in person and by deposition, was given to the effect that at various Director's meetings over the past few years, management had informed them as to the need for new and larger generating stations with the corresponding transmission line requirements to deliver the electricity to the point of need. Plaintiff's Exhibit No. 7 (Executive Vice President Dickhoner's Report) summarized very well CG&E's responsibility and its method and manner of proceeding to meet that need. Likewise Defendant's Exhibit L (CG&E's 10 Year Forecast) shows in great detail the extent to which management prepared to fulfill its obligation. However, it is noted from the testimony of the various board members, that they placed heavy reliance and expressed great confidence in management and employees of the "agency" (Corporation). Stress was made particularly that CG&E had over 40-years of tremendous community rapport and had not had any trouble or problem with the acquisition of property for transmission lines. That its reputation in the Electric Utility field is recognized as one of the highest and best in

the nation with regard to its dealings and relationship with the public.

This case began to develope when the CG&E Right-of-Way people began to negotiate for easements to establish the transmission corridor. The CG&E Planning, Layout and Development Departments after designing and laying out the line to achieve the best possible economic and feasible route, gave the responsibility to its Chief Construction Engineer (Mr. Robert Swanson) to build the line. Immediately the people along the proposed line became apprehensive about the effect of a high voltage 345,000 volt line. The evidence discloses that they were worried about the effect of such high voltage on their health, (shock sensation, heart pacemakers, safety from electrocution), comfort (noise of the line), affect on cattle, wild life (migratory birds, wild animals), the esthetic effect and spoilage of the beauty of the land and finally the ecological effect on the land itself. The people became so concerned, they formed groups of neighbors to protest the establishment of the line and meetings were held with the Company (agency) representatives. Obviously the old truism "In union there is strength", "United we stand divided we fall" was applied and the Company got nowhere. The Company tried to negotiate with the defendants and the relationships from the beginning were very strained and very quickly fell apart without any hope of reconciliation. Evidence from both plaintiffs and defendants showed that the bargaining process was rendered hopeless by the demands of the defendants and this Court would certainly agree and find that the parties were not able to agree.

Section 163.03 O.R.C. places the burden of proof on the Landowner-Defendants to show the lack of necessity or the "abuse of discretion of the board or agency in determining the necessity".

Article I, Section 19 of the Ohio Constitution provides in its first sentence "Private property *shall ever* be held inviolate *but* subservient to the public welfare" (Emphasis ours).

Section 4933.15 O.R.C. gives electric companies the power to appropriate private property as is necessary subject however to the above quoted section of law and the Constitution.

This now brings us to the question of "What have the defendants proved by the required degree of proof (preponderance or greater weight of the evidence) that the plaintiffs' (Board or agency (Corporation)) have done or did not do to 'abuse their discretion' in determining the necessity"?

The court would first interprete the word NECESSITY.

> *Black's Law Dictionary, 4th Edition, p. 1011*: Necessary.
>
> This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper and of greater or lessor benefit or convenience, and its force and meaning must be determined with relation to the particular object sought. Ray County Excise Board v. Atchison, T. & S. F.R. Co., 183 Okl. 327, 91 P. 2d 1037, 1080.
>
> In eminent domain proceedings, it means land reasonably requisite and proper for accomplishment of and

> in view, not absolute necessity of particular location. State v. Whitecomb, 34 Mont. 415, 22 P. 2d 823.

Did the CG&E Agency supply its Board with enough facts in regard to the safety of the line as to its effects on the health, general welfare of humans, cattle and wild life? This court believes management did this as well as finding that defendants did not carry their burden of proof to the required degree to overcome Plaintiff's evidence Slides 1 through 9. Likewise, this Court feels that the Board and Agency has given consideration to the general proposition of esthetic concern when it considers structure design, shrub and tree maintenance, etc. The proposal of underground installation is out of the question, as construction costs as well as ecological effect, would certainly be in violation of the Board's and Agency's duty to supply electricity in an economical manner with the least amount of earth scarring and the potential danger of underground electricity. The evidence clearly showed that such costs of underground installation would be astronomical and would only result in exhorbitant electrical rates with an almost insurmountable difficulty of raising funds to finance such an installation by sale of stock or issuance of bonds.

Did the Board or Agency abuse its discretion by not considering "alternate routes"? The court in this vein finds that the Agency did look in the broad sense of the term at several vastly different Transmission corridors or general avenues of route transmission. As discussed above, an alternate route could also be considered as the underground approach but this was not feasible.

Now, however, the Court must further consider additional facts or evidence adduced in the trial. This court must comment on the extent to which the evidence was prepared and presented. Counsel on both sides are to be commended for the thoroughness of the exhibits, prepara-

tion of briefs and diligence in presentation of evidence. The Court was permitted the privilege of viewing the premises or a getting a "birds eye view" via helicopter of the proposed line and by virtue thereof was better enabled to comprehend and evaluate the aerial photographs (Exhibits Plaintiff's 1-10). Testimony from Mr. Swanson, (CG&E's Construction Engineer) reveals that the line starting at Willie Station just south of the Butler County line and ending at the proposed Seven Mile Station was *originally* a distance of 18.67 miles in length. This was the line given to him to construct by the Planning, Layout Maintenance and Development Departments (Mr. Robert Wiwi). There is no question in this court's mind that the tried and true geometric proposition of "the shortest distance between two points is a straight line" was applied to the drawing boards since quite logically, cost is and was of the utmost consideration. The evidence shows that when the Right-of-Way men (Mr. Rodau and Mr. William Moran, Jr.) began encountering negotiation problems, engineering began looking with greater detail over the suggested route. Likewise evidence showed that the Board was not made aware of the fact that the proposed route was directly over two historically registered sites (The Cochran and Burwinkle farms) nor were they made aware of other natural or improved areas (Girl Scout Camp) (Nieman's Camp of America Camp Ground, etc.) that were to be crossed. Those *incidentals* or details of route were by the Board's admission left to management's discretion. Now, Mr. Swanson could see his line was in trouble with the people, so his department began making changes. These changes were made at a rapid pace so that even while the trial was progressing last minute changes were made and with the earlier changes, the line increased in length to 19.5 miles and reflected 11.5 miles of change. This represents 61% of the original line that had been altered. Does

this constitute "bad faith" on the part of the Corporation, first with its own Board of Directors? This court thinks it does! Even though the Board lets "details" of the route to management, there certainly is a duty of that management to inform the Board about the necessity of the change when over 60% of the route is affected. How about "good faith" with the people? With the awesome right to exercise the power of Eminent Domain goes the responsibility to keep the landowners affected informed. In this case about 50% of the route change will affect *new* landowners! Is this "good policy"? If this court allows the appropriation, in effect it is this court that is approving the route in its final form, not the CG&E's Board of Directors. This court thinks that would be an abuse of discretion!

Plaintiffs argue in their brief that regardless of the 60% change in the route, defendants' properties are still on the route and it is still necessary to use their land. The result is still the same — this is a proposition similar to that in the criminal law of evidence relating to search warrants — the evidence obtained from an illegal search cannot be used as it is "Fruit of the poisoned tree". The appropriation of this property results from initially faulty procedures of the agency in conducting its business in the deep dark secret rooms of the drafting department.

This is a day of disclosure. Policies that were formerly secret are now open. The Public Utility Corporation that is given the power of Eminent Domain must disclose its plans to those affected landowners — there must be Citizen input. We have all seen to our amazement and disgust — Watergate — wrongful abuse of power in high places. This Trust *IS* sacred and must be respected by those in these high positions. It cannot be ignored by this court or any court if we are to follow our Constitution and our law. However, there are two sides to the coin. The landowners must likewise understand the rights of others to

electricity. Thought must be given to the industries and jobs that this transmission line would bring. The hospitals, homes and farms that require electricity to operate. *This transmission line is inevitable!* These landowners *cannot* say "We don't want it on our land — put it over on the next fellow's farm." When the Agency does it right — they have the right to the line — it is for the welfare of the people and the private land must be made subservient to that end.

There is a second reason that this court must find "abuse of discretion" on the part of the Agency. The evidence discloses that an independent "Environmental Impact Study" on the effect of this transmission line was ordered by the Agency in January of 1974. This study was not to be completed and was not so done until September, 1974. Neither the Board nor the Agency had the benefit of this report. As a matter of fact, the report was received by the Agency during the course of the trial and this resulted in some of the changes in the route as reflected by Mr. Swanson's aerial photos. It is interesting to note (Defendant's Exhibit L) the complete list of the Board of Directors of CG&E and also those of DP&L. These men are all successful Bankers, Financeers, Industrialists, Businessmen, all men of integrity and certainly knowledgeable, yet we see no one representing the interests of Citizens who are affected by the decisions of the Board. Look at this new field of Ecology. Judge Locher says in his opinion *The Cleveland Electric Illuminating Co.* v. *Carl Lecher, et al*, Common Pleas Court, Cuyahoga County, Ohio, Case No. 803733 —

> . . . "The Company in its evaluation of the efficacy of a proposed route applies the elements of AREAS, an acronym (R. p. 133) for the concerns of *area, reliability, economics, appearance* and *safety*.

> The Court suggests that, henceforth, the subject of ecology be added to the concerns enumerated above so that the E in AREAS which now represents *economy* be enlarged to encompass *ecology*, the missing component, as well. The acronym should read AREAS, thereby giving due emphasis to both the economy and the environment — not mutually exclusive considerations, one might add. Of course, all the criteria encompassed by the AREAS process must be given grave consideration; however, the most significant of all, in many determinations of the proper course of utility power and pipe lines, is the impact which those lines will cause upon the earth itself." . . .

In the instant case, management should have had the advantage of the "Environmental Impact Study" before the route was planned so the board could have been knowledgeable and made their decision in a truly informed manner. This court would find that a Board or Agency finding the necessity to use the right of Eminent Domain must give consideration to the effect on the land and the landuse before they can proceed.

Judgment for defendants at Plaintiffs' cost.

STATE OF OHIO,
BUTLER COUNTY COURT OF COMMON PLEAS

No. CV74-06-0403

CINCINNATI GAS & ELECTRIC COMPANY, et al,

Plaintiffs,

v.

JOSEPH N. DAVIES, et al,

Defendants.

and

No. CV74-06-0404

THE CINCINNATI GAS & ELECTRIC COMPANY, et al,

Plaintiffs,

v.

JOHN T. NIEMAN, et al,

Defendants.

SUPPLEMENTAL JUDGMENT ENTRY

This Judgment Entry supplements the entry of 26th of September, 1974 and is effective nunc pro tunc on that date.

WHEREFORE, it is considered, ordered and adjudged:

1. The plaintiffs have proven the necessity for the transmission of power through the proposed seven mile sub-station area, but the determination for the specific route and the specific parcels to be acquired

was done in such a way as to constitute an abuse of discretion.

2. The defendants have not met their burden of proof in overcoming the finding of the necessity for the transmission of power through the Seven Mile area, but they have sustained their burden of proof with respect to an abuse of discretion in the determination of the necessity for the specific route and the parcels to be acquired.

3. Proof that the plaintiffs' Boards of Directors did not have the benefit of the Environmental Impact Study at the time that the special transmission line route was approved is sufficient to overcome prima facie case of necessity for this specific route and the acquisition of these specific parcels of real estate.

4. Defendants have met their burden of proof that the Enviornmental Impact Study was not before the Board and, therefore, overcome plaintiffs' prima facie case of necessity for this specific route and for the acquisition for these specific parcels.

5. Proof that the plaintiffs did not take into account input from the public affected by the specific route of the line or from people in the community through which the line passes and in deciding the specific route of the line is sufficient to overcome plaintiffs' prima facie case as to the necessity of the specific line in question.

6. Defendants have met their burden of proof in showing that the interests of the affected public were not considered and have, therefore, overcome plaintiffs' prima facie case of necessity for the specific line in question.

7. Defendants have met their burden of proof in showing that the plaintiffs have abused their discretion in the determination that the specific transmission line route before this Court was necessity.

8. Defendants have met their burden of proof in

showing that the plaintiffs have acted in bad faith in determining that the specific route before this Court was necessary.

9. Anyone of the above findings in subparagraphs one, two, four, six, seven and eight is sufficient to constitute judgment for the defendants and holding that the specific transmission line before this Court is not necessary within the context of 4933.15 of the Ohio Revised Code and a holding that the taking of this specific parcel of real estate would not be consistent with the public welfare within the context of Section 19, Article I of the Ohio Constitution.

10. Defendants have met their burden of proof within the context of section 163.03 Ohio Revised Code in all respects set forth above and a finding in favor of the defendants as set forth in subparagraphs one, two, four, six, seven and eight above requires judgment for defendants.

11. The Court finds that Chapter 163 of Ohio Revised Code is constitutional.

12. The Court, therefore, enters judgment for the defendants on each of the grounds set forth in subparagraphs one, two, four, six, seven and eight above at the plaintiffs' costs.

.....

Robert L. Marrs, Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

No. CA 74-10-0086

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-
Cross-Appellees,

vs.

JOSEPH N. DAVIES, ET AL.,
Defendants-Appellees-
Cross-Appellants,

No. CA 74-10-0087

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-
Cross-Appellees,

vs.

JOHN T. NIEMAN, ET AL.,
Defendants-Appellees-
Cross-Appellants.

OPINION

(Filed June 30, 1975)

APPEAL ON QUESTIONS OF LAW FROM COURT OF COMMON PLEAS, BUTLER COUNTY, OHIO

Messrs. Beirne and Withlin, C. R. Beirne and Michael A. Fulton of counsel, 2912 Carew Tower, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

Messrs. Robert E. Manley, 2205 Carew Tower, Cincinnati, Ohio 45202, and Thomas W. Baden, 804 First National Bank Building, Hamilton, Ohio 45011, for Defendants-Appellees,

Mr. Kenneth Heuck, Jr., 2303 Central Trust Tower, Cincinnati, Ohio 45202, for Intervenors.

BY THE COURT.

The Cincinnati Gas and Electric Company and Dayton Power and Light Company sought to appropriate easements over lands of Davies and Nieman by separate actions under Section 163 et seq. of the Revised Code. The respective defendants filed their answers timely and denied that the parties had been unable to agree as to compensation, denied the necessity of the appropriation and specifically alleged many other reasons why the appropriation should be disallowed. The two actions were consolidated for purpose of trial. The defendants challenged the necessity of the appropriation and after several days of trial the court denied the right of Cincinnati Gas and Electric Company and Dayton Power and Light Company to make the appropriation. Cincinnati Gas and Electric Company and Dayton Power and Light Company will hereinafter be referred to as the Agencies and the defendants as the owners. It is from this judgment that the Agencies appeal to this Court.

The Agency, Cincinnati Gas and Electric Company, was the owner of the Miami Fort Power station, located at the junction of the Ohio and Great Miami Rivers. It entered

into an agreement to build two new generating units at this station with the Agency, Dayton Power and Light Company, and to construct a new transmission line from the new units to the Dayton area. The sole responsibility for constructing this line as far as the Village of Seven Mile was upon the Agency, Cincinnati Gas and Electric Company. Beyond Seven Mile the responsibility was that of Dayton Power and Light Company. The properties of the defendants in these proceedings was on that part of the line that the Agency, Cincinnati Gas and Electric Company, was responsible for constructing.

The court rendered its opinion which was styled a Judgment. Four days later the court approved a Supplemental Judgment Entry, the effect of which was to deny the appropriation in these two cases.

In addition, defendants have filed cross-appeals claiming that Chapter 163 is unconstitutional.

There is also an appeal by Jennings E. Stiles and Dorothy Stiles, who claim some interest in the proceedings as an adjacent property owner. These parties sought leave to intervene in these cases and their motion was overruled by the trial court.

We shall first consider the claim of the Stiles that they had the right to intervene. They file three assignments of error:

(1) Intervenors were denied their adequate remedy at law by the denial of their motion to intervene.

(2) Intervenors had a clear and direct interest in the property and the transaction which was the subject of these lawsuits and should have been permitted to intervene as a matter of right pursuant to O.R.C.P. Rule 24 (A) (2).

(3) Intervenors should have been permitted to intervene as Defendants pursuant to O.R.C.P. Rule 24 (B) (2).

The motion of Stiles' to intervene states they are "adjacent" property owners – that is, adjacent to the properties of defendants herein. At no place in the motion, or in the proferred answer, is there any claim that the proposed easement would pass over the property of intervenors.

R. C. § 163.01 (C) defines "owner" as follows:

> "Owner includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated."

Intervenors make no claim that they have an estate or title to the defendants' property, but say they have an interest in it. The word "interest" has reference to some ownership interest, viz, a lease or some such interest. The Stiles do not qualify as an "owner" under the statute.

The Stiles claim they should be permitted to intervene under Rules 24 (A) (2) and (B) (2). The applicants' claimed interest is not as an owner, but as an owner of adjacent property to that owned by defendants. The applicants have no property rights in defendants' property to protect. Further, the defendants are themselves adequately protecting their property rights in this action.

Section 24 (B) (2) is permissive and not mandatory. There does not appear to be a common question of fact between the issues in these cases and the problem of applicants with respect to their property. The easement crosses defendants' property but does not cross applicants' property. There would not be common questions of law either. The law governing the rights of an adjacent property owner is not the same as the law governing the taking of an easement across the defendants' land.

Applicants had no right to intervene in this case. Not being owners they were not denied an adequate remedy at law.

Applicants do not have an interest in the property such as would entitle them to interevene under the mandatory provisions of Rule 24 (A) (2).

Neither are applicants entitled to intervene as a matter of right under Rule 24 (B) (2) for the reasons before stated. This is a permissive section and we find no abuse of discretion on the part of the trial court. Applicants' assignments of error are overruled.

The judgment in this case is composed of two separate entries. The first is in the form of an opinion by the trial court. Four days later, a second entry was placed upon the Journal. It is styled "Supplemental Judgment Entry."

In the opinion entry the court found that defendants did not carry their burden of proof that the safety and welfare of humans and animals was in jeopardy. The court found that plaintiffs had considered aesthetic matters as they related to structure design, shrub and tree maintenance. The court found that underground installation would be too costly and out of the question. The court also found that plaintiffs did look at several vastly different transmission corridors, including the underground approach.

Thereafter, the court found that although the line was necessary, there was no necessity for it on the route laid out by plaintiffs. In fact, it stated that the line was inevitable and "when the Agency does it right – they have the right to the line – it is for the welfare of the people and the private land must be made subservient to that end." The court then stated that the plaintiffs abused their discretion in not having the Environmental Impact Study made and submitted to the Board of Directors prior to the decision to appropriate plaintiffs' property. The court also found that the Agencies did not take into account the interests of the public when they laid out the transmission line corridor.

These findings and judgment of the court were incorporated in a Supplemental Judgment Entry four days later which also declared Chapter 163 R. C. to be constitutional.

Appellant Agencies have filed herein their assignments of error as follows:

> **ASSIGNMENT OF ERROR No. 1.** The trial court erred in ruling that the Cincinnati Gas and Electric Company and the Dayton Power and Light Company were guilty of bad faith and an abuse of discretion in determining the necessity for the acquisition of easements over the properties of each of the two owners in the present action.
>
> **ASSIGNMENT OF ERROR No. 2.** The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion when the utility adopted changes in the specific route for the Miami Fort to Seven Mile Transmission Line, without first seeking the approval of its Board of Directors to make such changes, even though the changes in no way affected the location of the easements sought over the properties of each of the two owners in the present action.
>
> **ASSIGNMENT OF ERROR No. 3.** The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion in not submitting an environmental report prepared by an outside consulting firm to its Board of Directors, when the report was requested only to supplement the utility's own extensive environmental study and did not affect the resolution to take the property of each of the two owners in the present action.
>
> **ASSIGNMENT OF ERROR No. 3-A.** The trial court erred in ruling that at the time the Cincinnati Gas and Electric Company determined the specific route of the proposed transmission line, it did not have the benefit of the study of the outside environmental consulting firm.

> **ASSIGNMENT OF ERROR No. 4.** The ruling of the trial court that the interests of the people who were affected by the proposed transmission line were not considered by the Cincinnati Gas and Electric Company in its determination of the specific route for the proposed transmission line is completely without support in the record and is therefore contrary to the manifest weight of the evidence.

1. Article I § 19 of the Constitution of Ohio provides that —

> "Private property shall ever be held inviolate but subservient to the public welfare . . ."

The General Assembly has established the public policy that electric utility companies may exercise the power of eminent domain for the public welfare as provided in R. C. § 4933.15. Such section provides that "The right of appropriation shall be exercised in the same manner provided by section 163.01 to 163.22, inclusive, of the Revised Code."

Section 163.09 R. C. provides that only three issues may be made by answer of the owners — (1) The right to make the appropriation; (2) The inability of the parties to agree; and (3) The necessity of the appropriation. The burden of proof is upon the owners and the resolutions of necessity by the respective boards are prima facie evidence of necessity in the absence of an abuse of discretion by the Agency.

> "In a proceeding by a private corporation to appropriate an easement for the construction of an electric transmission line, the necessity of the appropriation which the corporation is required to prove, is a reasonable necessity rather than an absolute necessity."
>
> *The Ohio Edison Co.* v. *Gantz,* 109 Ohio App. 127 (1958).

The *Gantz* case was decided prior to effective date of Chapter 163 R. C. when the burden of proof of necessity was on the corporation, but the quality and character of the term "necessity" has not changed.

Giesy v. *Cincinnati, Wilmington and Zanesville Rd. Co.*, 4 Ohio St. 308, 327.
19A Ohio Jur. 2d p. 172 § 74.
29A C. J. S. 373, 374, § 90.

Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court.

The Ohio Edison Co. v. *Gantz*, supra.
Jones v. *Village of Maumee*, 20 Ohio App. 455,
Cleveland and Pittsburgh Rd. Co. v. *East Liverpool*, 51 W. L. B. 599,
Cotabish v. *Cleveland Electric Illuminating Company*, 28 Ohio App. 198.

This appears to be consistent with the general rule.

". . . In the absence of legislative restriction, the delegation of the power of eminent domain gives the grantee of the power the right to determine the location and route of the improvement and of the land to be taken for it and such determination will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious, or in some respects beyond the privilege conferred by the charter or statute. Evidence that another route is feasible is not sufficient to show that the grantee's selection constitutes bad faith, oppression or abuse of power.

The landowner cannot raise the objection that there is no necessity for condemning his property because

some other location might be made, or some other property obtained which would be more suitable."

29A C. J. S. 376-378 § 91.

"The landowner's objection that some other site would serve just as well is not sustained by the courts for the reason that every other property owner could make the same objection, and if such objection has merit, then the project could never be built and the effect of the eminent domain statute becomes nugatory."

Jahr, *Eminent Domain*, Sections 32, 51.

A recent case of interest is *Board of Education* v. *Holding Corp. of Ohio*, 29 Ohio App. 2d 114, (1971). There the Columbus Board of Education attempted to appropriate land for school purposes and the trial court denied such right. Apparently the court was influenced by the fact there was no ingress or egress to the property and the Board would not make immediate use of the same. The Court of Appeals reversed because it found no fraud, bad faith or abuse of discretion on the part of the school board.

The case of *Ohio Power Company* v. *Diller*, 18 Ohio App. (2) p. 167, has similar facts to the instant case. Ohio Power Company sought to appropriate lands of Diller for use as a transmission corridor. Defendant landowner appealed and the Court of Appeals affirmed, finding that the owners had not shown an abuse of discretion.

It should be kept in mind that we are here dealing with two statutory actions consolidated for trial. They are based on the eminent domain statute. They are not equity cases where broad equitable relief may be requested and granted. They do not constitute class actions. They deal only with two parcels of land out of a possible hundred or more parcels along the line. What the situation may

be ten miles down or up the line from the parcels of these two owners is hardly cause for finding an abuse of discretion by the Agencies as to the defendants' land. As far as the court can determine from the record there is nothing to justify the trial court's finding of an abuse of discretion in routing the line over these two parcels.

The trial court emphasized that about sixty-percent of the line was changed from the original. Much of this was to meet the objections of the property owners involved. Had the Agencies remained adamant and refused to make changes where possible they no doubt would have been severely criticized for not listening to the landowners and such intransigence would have been used to show the Agencies' lack of concern for the owners. We do not feel that this affected the defendants because the route was not changed over their property after the cases were filed.

The trial court in its opinion strayed far afield when it was pointed out that with all the changes it would still be necessary to cross defendants' land; and the trial court drew a parallel with the Criminal Search and Seizure law and said that this would prevent crossing defendants' land as Fruit of the poisoned tree. We fail to see the application of this reference to these cases. Accordingly, assignment of error number one is sustained.

2. Nor does this Court believe that the officers and management of the corporation owed a duty to the landowners to consult with the Board of Directors as to these changes. The trial court found that the Board had admitted that the details of the route was left to management's discretion. The right of the Directors to delegate authority to subordinate officers and agents in order to carry on the day-to-day functioning of the corporation is beyond question.

12 O Jur (2d) 508 § 404, p. 579 § 471.

We know of no reason why this rule should be otherwise in these cases. In fact, the top officers of management were also Directors of the Agencies and as such knew that changes in the route were being made.

> "When a petition for condemnation has been filed on behalf of a corporation by its executive officers, the owner of land sought to be taken cannot raise the objection that the directors of the corporation had not voted to authorize the filing of the petition."

See *Indiana and Michigan Electric Company* v. *Miller,* 19 Michigan App. 16, 172 N. W. 2d 223, 230-231 (1969), which quoted the above passage as authority.

It is also interesting to note that Section 163.05 (B) Ohio Revised Code, provides in part as follows:

> "Section 163.05 Petition for Appropriation. An agency . . . may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:
>
> '(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency to appropriate;'."

It does not require a resolution of the Board of Directors, but only a plain statement that the appropriation is necessary. Accordingly, assignment of error number two is sustained.

3. We come now to the question whether the Agencies were guilty of bad faith and abuse of discretion in not submitting an environmental report to its Board of Directors. This report, commissioned to an independent consulting firm in January, 1974, and delivered to the Agen-

cies at about the time of trial, was not submitted to the Board of Directors, but its executive officers had knowledge of its recommendations before the trial and adopted many of them. Again, we say that failure to obtain approval of the Board of Directors is not fatal and does not constitute either bad faith or an abuse of discretion. Accordingly, assignment of error number three is sustained.

3A. Exception is taken to the court's finding that the Environmental Study should have been made before the route was planned and that the Directors should have had such report before them at that time. There has been in recent years an awakening of our concern for the environment. Both Congress and the Ohio General Assembly have taken steps to protect the environment. Ohio adopted a Power Siting Act effective October 23, 1972, with respect to Utilities but provided for a two year grace period running to October 23, 1974. It other words, the Act did not apply to control Utilities construction commenced prior to October 23, 1974. See R. C. 4906.05.

Nevertheless, the Agencies owe a duty to defendant landowners to give serious consideration to the effect of this line on the properties of defendants. No doubt, it would have been wise if they had ordered the consultants report before they planned the line. It doesn't follow however, that the failure to do so constituted bad faith or abuse of discretion. The record shows they made their own studies of the effect on the environment and that as they received recommendations from time to time while the outside study was being made, they gave consideration to such recommendations. It seems fair to observe at this point that no matter where this line is routed, the environment will suffer and some landowner will feel aggrieved. Again, it is a question of balancing the public need for electric

service against such damage. Accordingly, assignment of error three-A is sustained.

4. Appellants claim the court was in error in holding that the Agencies gave no consideration to the interests of people affected by the proposed line and that such holding is against the manifest weight of the evidence. The record shows that after the intial survey of the route, the companies contacted defendants and other affected owners. They explained the purpose of the line and where it would pass over defendants' property – and the line was moved to another part of the Nieman property. There was even a meeting with citizens of the area as early as May, 1973, to discuss the line, at which meeting brochures explaining the need for the line were distributed. Federal guidelines of the Department of Interior and Department of Agriculture were considered and followed where possible. There was nothing in the law at the time that required public hearings or newspaper notice of the contemplated construction. Chapter 163 R. C. and specifically § 163.09 does not require public notice or public hearings. Perhaps, the questions involving environment will never again occur in future constructions because of the requirements of the Power Siting Act. But, as to these particular cases we do not believe the failure of the Agencies to have before them the Environmental report constituted either an abuse of discretion or bad faith.

We do not find anything sinister on the part of the Agencies, in the court's reference to "the deep dark secret rooms of the drafting department" nor can we equate the conduct of the Agencies in planning this line, with Watergate. We find from the record that the appellants made every reasonable effort to inform the defendants and were unsuccessful in their negotiations with defendants and that the

judgment of the court to the contrary is manifestly against the weight of the evidence.

Abuse of discretion has been defined as implying not merely an error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency.

Alliance v. *Joyce,* 49 Ohio St. 7, 22.

Bad faith has been defined as importing a dishonest purpose, moral obliguity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Slater v. *Motorists Mutual Ins. Co.,* 174 Ohio St. 148.

We find that the record does not sustain a finding that the Agencies were guilty of bad faith or abuse of discretion.

We accordingly find the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Assignment of error number four is sustained.

Although the defendants prevailed in the trial court, they have filed their cross-appeals contending that Chapter 163 R. C. is unconstitutional. The trial court judgment found that Chapter 163 R. C. was constitutional. Defendants-appellees have filed six assignments of error, which are:

> I. Chapter 163 of the Ohio Revised Code is an unconstitutional attempt of the Ohio Legislature to repeal the law of the land as it pertains to appropriation proceedings and purports to establish a procedure whereby private property may be appropriated without providing the due process of law to the property owner.

> II. The provisions of Chapter 163, Ohio Revised Code, violate the most elemental notions of what constitutes due process in an appropriation of private property context.
>
> III. The Court of Common Pleas erred in ruling that the defendants were not entitled to adequately prepare their case in accordance with the discovery provisions of the Ohio Rules of Civil Procedure.
>
> IV. The failure of the Court of Common Pleas to rule upon the defendants' motions pertaining to discovery constituted a denial to the defendants of the due process of the law and deprived them of an opportunity to adequately prepare and present their case on the merits.
>
> V. The ruling by the Court of Common Pleas setting a trial date of August 29, 1974, constituted an unconstitutional deprivation of due process and prohibited the defendants from adequately preparing their case.
>
> VI. The provisions of § 163.09, Ohio Revised Code, unconstitutionally placed upon these defendants the burden of proving the negative of a proposition, concerning which all of the relevant facts were in the possession of the plaintiffs.

Appellants contend that this is an improper cross-appeal; that it is an attempt to appeal from a finding and not a judgment; and that the appellee was the prevailing party and consequently suffered no prejudicial error.

Appellees raised this constitutional question in the trial court and, if denied their cross-appeal, it would mean that they would have no way of continuing to urge the unconstitutionality of Chapter 163. If it is unconstitutional, then the entire proceeding in these cases fails and there would be no right to take these properties at all. We

believe we should entertain such cross-appeal and deal with the issues raised therein.

Assignments I and II are related and will be considered together. They claim Chapter 163 R. C. denies due process of law under the Federal and State Constitutions.

> "Generally speaking, the guaranty of due process of law was designed as security against arbitrary action, its purpose being to exclude arbitrary power from every branch of the government. Arbitrary action constitutes a denial of due process, and in certain proceedings such action may be the only basis for a claim of denial of due process."
>
> 11 O Jur 2d 48 § 696; 19A O Jur 2d p. 83 § 8; 19A O Jur 2d p. 390 § 242.

> "The fundamental requirement of due process of law is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is involved."
>
> *Anderson National Bank* v. *Luckett,* 321 U.S. 233.

Pursuant to Art I § 19, and to provide a procedure for the exercise of the power of eminent domain, the General Assembly enacted the Uniform Eminent Domain Act, being Chapter 163 R. C. Defendants complaint that the procedure as set up in Chapter 163 does not give them sufficient time to prepare their case and therefore denies them due process. A similar claim was made with respect to § 163.08 that the 30 day limit on filing an answer was too restrictive and denied them a jury trial, in the case of *City of Cincinnati* v. *The Bossert Machine Co.,* 16 Ohio St. 2d 76. The Supreme Court in that case held § 163.08 and 163.09 to be constitutional.

The court in *Ohio Power Co.* v. *Diller,* supra, considered R. C. § 163.09 with respect to placing the burden of

proof on the landowner, and declared it to be constitutional. With respect to the timetable for preparation and trial of appropriation cases, who is to say what is a reasonable time to prepare and try the case? That duty falls on the General Assembly. In these cases we hold that defendants had an opportunity to be heard and that the proceedings were adequate to safeguard their rights. There was no violation of defendants' due process rights. Assignments I and II are overruled.

Assignments III and IV claim the court erred in its ruling that defendants were not entitled to discovery under the Rules of Civil Procedure and that the failure of the court to rule on their discovery motions denied them due process of law. We sustain the action of the trial court in holding that Rule I (C) of the Rules of Civil Procedure excepts appropriation cases from its operation, and in holding that R. C. § 163.10 limits the deposing of witnesses on cross-examination to officers, employees, or agents of the Agency. This does not include Directors. It should be noted, however, that the top three operating officers of each Company, who were also directors, were deposed. This is a procedural matter, established by the legislature and discovery gives rise to no constitutional question. The failure of the court to rule on subsequent motions for discovery amounted to a denial of the motions, but under the circumstances we find no denial of due process and Assignments III and IV are denied.

Assignment of Error No. V is a restatement and enlargement of the first four assignments. Specifically it complains that the trial date of August 29, 1974, did not give defendants enough time to prepare their case. R. C. § 163.09 provides that the hearing on the question of necessity shall be held no less than five nor more than fifteen days after filing of an answer. In these cases the court

set the trial date on August 29, which was 72 days after filing the cases. The record in the cases is quite extensive, including many depositions taken by defendants. It reflects diligence in preparation on both sides. Again, we say this timetable is legislative. We do not find it amounts to a violation of defendants' due process rights. Assignment of Error No. V is overruled.

In defendants' final Assignment of Error No. VI, it is claimed that placing the burden on the property owners to prove lack of necessity for the line, was unconstitutional. Prior to the passage of Chapter 163 the burden was on the corporation to prove necessity.

"The General Assembly of this state has authority to prescribe the circumstances that shall constitute prima facie evidence of a fact in issue in an action on trial in the courts of this state, whether the cause of action to which it relates arose within or without the territorial limits of the state."

The Pennsylvania Co. v. *McCann,* 54 Ohio St. 10
Ohio Power Co. v. *Diller,* 18 Ohio App. 2d 167

We see no constitutional violation of defendants' rights and Assignment VI is overruled.

We find that the record does not sustain a finding that the Agencies were guilty of bad faith or of abuse of discretion in their actions in laying out and attempting to construct the transmission line across the property of the parties defendant. We accordingly hold that the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Accordingly, we reverse the action of the trial court and remand these cases to the Court of Common Pleas of Butler County, Ohio, for further proceedings not inconsistent with this Opinion.

BUZZARD, P. J., CRAWFORD and STRAUSBAUGH, JJ.

BUZZARD, P. J., AND CRAWFORD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
BUTLER COUNTY, OHIO

No. CA 74-10-0086

THE CINCINNATI GAS AND ELECTRIC COMPANY and
THE DAYTON POWER AND LIGHT COMPANY,
Appellants,

vs.

JOSEPH N. DAVIES and MURIEL G. DAVIES,
Appellees.

No. CA 74-10-0087

THE CINCINNATI GAS AND ELECTRIC COMPANY and
THE DAYTON POWER AND LIGHT COMPANY,
Appellants,

vs.

JOHN T. NIEMAN, MARILYN G. NIEMAN and
U. S. FARMERS HOME ADMINISTRATION,
U. S. DEPARTMENT OF AGRICULTURE,
Appellees.

JUDGMENT ENTRY

(Filed in Court of Appeals Butler County, Ohio June 30, 1975 Edward S. Robb, Jr., Clerk)

These causes came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Butler County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Butler County, Ohio, be, and the same hereby is, reversed and we remand these cases to the Court of Common Pleas of Butler County, Ohio, for further proceedings not inconsistent with this Opinion.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this Judgment.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellees, by their counsel, except.

THE SUPREME COURT OF THE STATE OF OHIO

1975 TERM

To wit: October 16, 1975

No. 75-806

THE STATE OF OHIO,
City of Columbus.

CINCINNATI GAS & ELECTRIC COMPANY, ET AL.,
Appellees,

vs.

JOSEPH N. DAVIES, ET AL.,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for Butler County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:

Motion Fee, $20.00, paid by Robert E. Manley.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19..

..... Clerk
..... Deputy

THE SUPREME COURT OF OHIO

1975 TERM

To wit: October 16, 1975

No. 75-805

THE STATE OF OHIO,
City of Columbus.

CINCINNATI GAS & ELECTRIC COMPANY, ET AL.,
Appellees,

vs.

JOHN T. NEIMAN, ET AL.,
Appellants.

APPEAL FROM THE COURT OF APPEALS

for Butler County

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

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this .... day of 19..

..... Clerk
..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1975 TERM

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CINCINNATI GAS & ELECTRIC COMPANY, ET AL.,
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..... Clerk
..... Deputy

STATUTES

OHIO REVISED CODE

§ 163.05 Petition for appropriation.

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and adresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any

parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

§ 163.08 Answer by property owner to petition.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 Valuation of property taken; how determined.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts, by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.-08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An

order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matter set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

§ 163.10 Jury selection; qualifications.

The assessment of compensation may be made at a regular or special term of court. The jury shall be selected

from the jurors drawn as prescribed in sections 2313.19 to 2313.26, of the Revised Code, and qualified as in civil actions. However, it shall be grounds for challenge for cause if a juror has served in two appropriation trials in the current term of court. Depositions may be taken as in other civil cases, subject to the requirements of section 5501.21 of the Revised Code. Depositions of the officers, agents, or employees of the agency or owner shall be taken as on cross-examination. No evidence may be adduced or elicited in depositions as to value or apraisals on cross-examination, unless raised by direct examination.

§ 2709.10 (Repealed) Preliminary questions; proof of corporate existence.

On the day named in a summons first served, or publication first completed in an action by a corporation to appropriate private property, the probate judge or the court of common pleas shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof is upon the corporation, and any interested person shall be heard. Proof that a railroad corporation, foreign or domestic, and its predecessors, as lessee or otherwise, has owned or operated a railroad within this state for twenty-five years is prima-facie evidence of the de jure existence of such corporation, and it is not necessary to prove the fact of incorportion or the de jure existence of such corporation unless the defendants file a pleading containing a specific denial of such incorporation and the de jure existence thereof.

§ 4933.15 Appropriation of property by electric companies.

Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use, may, for the purpose of making preliminary examinations and surveys, enter upon any land held by any individual or corporation, whether acquired by purchase, appropriation proceedings, or other wise, unless such land is owned by and essential to the purposes of another corporation possessing the power of eminent domain, and may appropriate so much of such land, or any right or interest therein, including any trees, edifices, or buildings thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances, or for rights of way over such land and adjacent lands for the purpose of access to any part of such land. The right of appropriation shall be exercised in the same manner provided by sections 163.01 to 163.22, inclusive, of the Revised Code.

OHIO RULES OF CIVIL PROCEDURE

RULE 1. Scope of rules: applicability; construction; exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Supreme Court, U. S.
FILED
FEB 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-990

JOSEPH N. DAVIES and MURIEL G. DAVIES,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
and THE DAYTON POWER & LIGHT COMPANY,
Respondents,

and

JOHN T. NIEMAN and MARILYN G. NIEMAN,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
THE DAYTON POWER & LIGHT COMPANY,
UNITED STATES FARMERS HOME
ADMINISTRATION,
JENNINGS E. STILES and DOROTHY STILES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

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JENNINGS E. STILES and DOROTHY STILES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

COUNTERSTATEMENT OF THE CASE

The inaccuracies contained in the Petitioners' Statement of the Case require this Counterstatement including Counterstatements of the Pre-Trial Proceedings and the Proceedings on the Merits.

Contrary to the assertions of Petitioners, the trial court did not deny Petitioners the right to discovery of the facts necessary to prepare their case. (Petition, P. 6) In fact, Petitioners were accorded the unrestricted right to depose any and all officers, agents or employees of the Respondents and the unrestricted right to inspect any and all documents in the possession of Respondents, excepting only those documents which were precluded as part of Respondents' trial preparation material. Petitioners took full advantage of such discovery and engaged in an extensive series of depositions of the top-level officers and engineers in both utility defendants. In addition, Petitioners requested and were provided with numerous technical and official records, reports and documents of Respondents.

The following statement of Petitioners, appearing at page 6 of the Petition, is, on its face, both unintelligible and misleading:

> "The Court of Appeals, however, gave much greater weight than did the trial court to the presumption of legality of the private decision of the utility companies to appropriate the property, and it reversed the judgment, holding that the burden of proof was greater than that sustained by Petitioners."

This statement erroneously infers that the Ohio Court of Appeals failed to follow the provisions of Section 163.09, Ohio Revised Code, in ruling upon the presumptions and the burden of proof applicable to this appropriation proceeding. The Court of Appeals simply held that the Petitioners completely failed to adduce any competent evidence on the central question of necessity and that the reasons given by the trial court for denying appropriation of Petitioners' properties were based upon evidence that had nothing whatsoever to do with the only issue the trial

court had to decide; namely, whether it was necessary to acquire easements over the properties of Petitioners.

COUNTERSTATEMENT OF PRE-TRIAL PROCEEDINGS

During pre-trial proceedings, it was clear that the inflammatory and highly prejudicial allegations which Petitioners made in their answers to the appropriation complaints raised issues which had only a remote possibility of gaining any support from the personnel and records of Respondents. Furthermore, they bore little relationship to the basic question of the necessity of the line. For example, Petitioners charged that the proposed 345 KV (345,000 volts) transmission line would be injurious to the people, livestock, fish, crops, wild animals, migratory birds, and all other forms of life existing in the area where the line is planned to be constructed. Petitioners spent day after day taking the depositions of the companys' top officers and engineers, only to learn that 345 KV transmission lines are a safe, widely used and proven means of transmitting electricity. There are more than 25,000 miles of such lines in use in this country today.

The trial court did not enforce the literal provisions of Section 163.09, Ohio Revised Code, by requiring a hearing within 15 days following the filing of the answers to the Complaints, as implied throughout Petitioners' brief. Rather, the Court expanded the statutorily required timeframe for discovery and trial in order to permit Petitioners to engage in extensive discovery attempting to prove their unfounded assertions that it was not necessary to construct this important public improvement.

The trial court was aware of the fact that Petitioners were members of a very active organization of residents

living in the effected area. This organization had been formed more than a year and a half prior to trial for the express purpose of gathering information and attempting to find any means possible by which this proposed transmission line could be blocked. More than six months prior to the trial of this case, the citizens' organization had retained present counsel who thereupon filed an injunction suit against Respondents before Respondents were ready to file the appropriation suits. One of the attorneys who has been involved in that injunction suit as well as in this action is a former employee of the Respondent, Cincinnati Gas & Electric Company, and has had considerable work experience in the planning and operational aspects of high voltage transmission lines.

The prior injunction suit was ultimately dismissed on the pleadings at the trial court level and, following appeal, was remanded to the trial court for a full trial on the merits. *Butler County Citizens Committee, et al.* v. *The Dayton Power and Light Co., et al.*, — Ohio App. 2d —, — Ohio Op. 2d — (No. CA 74-06-0055, decided June 16, 1975). Surprisingly, however, even though the complaint in that injunction suit raised all of the same issues raised by Petitioners in this case (word for word in most instances), the property owners dismissed the action after it was assigned for trial in another county. (Dismissal entered December 1, 1975).

Petitioners' allegation that Respondents refused to produce an environmental report prior to trial is grossly false and misleading (Petition, P. 9). The truth is that the written report of the outside consultant had not even been made available to Respondents because it was in its final stages of completion during the summer of 1974. Furthermore, Petitioners were told time and time again that Respondents were relying primarily upon their own

extensive in-house study of the route of the line to establish its necessity and conformity to environmental requirements. The details of the in-house study had been fully disclosed to the Petitioners during pre-trial discovery. The outside consultant, Commonwealth Associates, Inc. of Jackson, Michigan, had been employed as an expert witness for the sole purpose of confirming the validity of Respondents' environmental investigation and conclusions.

COUNTERSTATEMENT OF PROCEEDINGS ON THE MERITS

Petitioners argue that they were denied the right to cross examine every member of Respondents' Boards of Directors, in what promised to be a repetitious and purposeless series of time-consuming depositions. Had Petitioners fully informed this Court, they would have acknowledged in their brief that they did in fact take the depositions of three of the Directors of the Respondent Cincinnati Gas & Electric Company (CG&E), and three of Dayton Power and Light Company's (DP&L) Directors. One of the Directors so deposed, testified that he was responsible for keeping the other Directors apprised of the progress of the transmission line. The other CG&E Directors whose depositions were taken, testified to what information they and the other Directors on the Board had relative to this transmission line, particularly during the period that the Resolutions to take Petitioners' properties were passed. The trial court and Respondents perceived very early in the case that the only reason Petitioners were demanding the depositions of each and every Director was to cause inconvenience and unnecessary harassment of the Respondents' policymaking bodies, rather than pursue a

good faith effort to develop facts. Moreover, Petitioners were well aware from the discovery witnesses that the Directors relied upon the companys' officers and employees to carry out the day-to-day functions necessary to plan, construct and operate the subject transmission line. The Ohio Court of Appeals thereafter agreed that reliance by the Board of Directors upon management for such tasks was in accordance with law. (Petition, PP. 24a-25a).

Petitioners' allegation that serious environmental defects of the proposed line were revealed by expert testimony of an architectural historian and a member of the Ohio Power Siting Commission is contrary to the facts revealed in the record (Petition, P. 6). The member of the Ohio Power Siting Commission admitted that he had no knowledge of how this line would be constructed or why the company chose the particular route that it did or what environmental safeguards would be employed. The architectural historian likewise had no knowledge of the proposed line, or its overall route, or of what environmental effects the line may or may not have.

The claim of Petitioners that Respondents concealed information relative to the demand trend (i.e. the peak amount of electricity consumed by the utilities' customers each year) until after the trial was completed, is also contrary to the facts. Petitioners were supplied with all of the information and documents which were then available to Respondents on this subject. Petitioners knew that the proposed line was planned based upon information available to Respondents *at least 3 years prior to the time that this case was instituted,* and they were fully supplied with that information. Because of the amount of time required to construct a new power facility and the transmission lines which must serve it, an immense amount of capital is committed many years in advance of construction

of such facilities, based solely upon the best information available at the time that the projects are planned. An isolated one year leveling off of demand obviously would not have been material to the Respondents' long range plans.

While it would serve no useful purpose to comment upon every inaccuracy contained in the Petitioners' brief, the material inaccuracies contained at pages 14 and 15 of their brief will be addressed fully in the next section herein.

REASONS THE WRIT SHOULD BE DENIED

The Petitioners persist throughout their brief in making the argument that this case involves a basic denial of the right of discovery, by virtue of the Respondents' alleged concealment of evidence and refusal to allow meaningful discovery. The following list of the utilities' personnel that the property owners deposed does, by itself, overcome Petitioners' empty facade of unfairness. The persons deposed include:

B. John Yeager, President, Director,
Miles J. Doan, Senior Vice-President, Director,
William H. Dickhoner, Executive Vice-President, Director,
Walter J. Ott, Vice-President, Rate & Economic Research,
William T. Woodrow, Economist,
Robert P. Wiwi, Engineer, Electrical Operations
Robert D. Swanson, Principal Transmission Engineer,
John E. Grote, Manager, Electrical Planning Department,

from the Cincinnati Gas & Electric Company and,

Robert B. Killen, President, Director,

Dwight Garber, Vice-President, Service Gas & Divisions Operations, Director,

Morton T. Lewis, Vice-President & Treasurer, Director,

Everett D. Smith, Group Vice-President,

Richard F. H. Wessel, Manager, Engineering Division,

Louis C. Cobb, Manager, Regulatory Affairs,

from the Dayton Power & Light Company. The property owners thus deposed both Presidents of the companies and a total of six vice-presidents, as well as the top ranking electrical engineers having operational responsibility for the planning and construction of the transmission line. Such discovery was provided even though no formal subpoenas or notices of any kind were ever issued to Respondents' personnel. There are probably few cases involving appropriations of property, or any other type of civil litigation, wherein so many high ranking officers and directors of two corporations were subjected to such probing and in-depth discovery. The discovery was terminated only when the property owners counsel declared that they had no further witnesses they wished to depose. In addition, a substantial amount of documents were produced upon request without subpoenas.

Petitioners assert that the burden of proof placed upon the property owner is so strong that it is virtually impossible to overcome (Petition, P. 26). They contend that placing the burden of proof upon the property owner to show an abuse of discretion, and the establishment of a presumption of good faith in favor of the appropriating authority in determining the necessity for the appropriation amounts to a radical change in Ohio eminent domain law, and that Chapter 163, of the the Ohio Revised Code has

had a devastating effect on the property owners of Ohio (Petition, P. 23). These assertions are contrary to the history of eminent domain law in Ohio.

To understand the rationale of Chapter 163 which became effective in 1966, it should be understood that prior to this revision in the Ohio condemnation statutes, the only issue which could be litigated was the amount of compensation. The property owner was not even permitted to raise the issue of public necessity in the appropriation proceeding because that was considered to be a non-justiciable political question. In order to raise issues other than compensation, the landowner was required to bring a separate action for injunctive relief; but the only issues to be determined in this separate suit were abuse of discretion, fraud and bad faith. And, as plaintiff to such suit, the landowner had the burden of proof of the validity of his allegations against the public bodies by the degree of proof required in actions for an injunction. *Pittsburg, C. C. & St. L. Ry. Co.* v. *City of Greenville,* 69 Ohio St. 487, 69 N.E. 976 (1904); *Sargent* v. *City of Cincinnati,* 110 Ohio St. 444, 144 N.E. 132 (1924); *Emery* v. *City of Toledo,* 121 Ohio St. 257, 167 N.E. 889 (1929); *Thormyer* v. *Irvin,* 170 Ohio St. 276, 164 N.E. 2d 420 (1960).

A leading case authority in Ohio Eminent Domain law is *Ohio Power Co.* v. *Diller,* 18 Ohio App.2d 167, 172-3, 247 N.E.2d 774, 778-9 (Putnam Cty. 1969). There, the Court described the history of Chapter 163 briefly as follows:

> "In the case of *Emery* v. *Toledo* (1929), 121 Ohio St. 257, 264, the Supreme Court said:
>
> '• • • This court, in *Sargent* v. *City of Cincinnati,* 110 Ohio St. 444, 144 N.E. 132, followed *P., C., C. & St. L. Ry. Co.* v. *City of Greenville,* 69

Ohio St. 487, 69 N.E. 976, in holding that in a proceeding to assess compensation for taking private property by a municipality for public use the only issue to be tried is the value of the property, and, further, that the question of public need and the extent of that need is a political question, and not justiciable. This doctrine is universal. It has been so declared in *Shoemaker* v. *United States,* 147 U.S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170, and *Sears, Trustee* v. *City of Akron,* 246 U.S. 242, 38 S. Ct. 245, 62 L.Ed. 688. * * *'

* * *

"We believe that Section 163.09 (B), Revised Code, merely codified the law as it had existed previously in relation to the necessity for the appropriation and the rebuttal of the necessity thereof." (Emphasis supplied.)

Also prior to the enactment of Chapter 163, corporations such as utilities which possessed the power to appropriate private property, did so according to the provisions of Chapter 2709, Ohio Rev. Code. Here, the burden was on the utilities to prove the right to make the appropriation, the inability to agree and the necessity for the appropriation. See Sec. 2709.10, Ohio Rev. Code. Thus, what the Ohio legislature accomplished with the passage of Chapter 163, was to merge into one statute (with the exception of highway appropriations under certain conditions), all proceedings for all appropriations of property for the public use whether by a public or private agency.[1] Chapter 163 was therefore the product of the

[1] The legislature had good reason to do this. The following passage from Vol. 27, Ohio State Law Journal, pages 525, 527-8, provides an excellent insight into the legislature's purpose.

"At the time of the enactment of the Uniform [Eminent Domain] Act there were fourteen separate, distinct, and complete procedures by which eminent domain could be exercised, making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure. *Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised. Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners. The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act.* Whether the act permits the courts to perform properly their functions of ensuring just compensation and administering transfer of title and possession is yet to be determined.

"Since the fairness and efficiency of Ohio's Uniform Act are determined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation. Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsmen of the Ohio act was to blend these competing interests into a fair and efficient proceeding." Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession,* 27 Ohio St. L. J. 525 (1966) (emphasis supplied)

Ohio legislature's desire to modernize eminent domain procedures and to conform the substantive and procedural concepts of public appropriations to the realities of life in 1966 and beyond.

The portion of Section 163.09 (B) which the property owners seek to destroy reads as follows:

"(T) he burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body,

counsel, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity."

Under Ohio law, prima-facie evidence is that creating a presumption of the validity of the fact asserted, which presumption may be rebutted by proof of facts which tend to show the contrary. *Brunny* v. *Prudential Ins. Co.*, 151 Ohio St. 86, 92-93, 84 N.E.2d 504 (1949); *Ginn* v. *Dolan*, 81 Ohio St. 121, 127, 90 N.E. 141 (1909). And, it has long been established in this country that no constitutional infirmities are occasioned by requiring a party to present evidence to overcome prima-facie evidence by the opposing party. *Mobile, J. & K. C. R.R. Co.* v. *Turnipseed*, 219 U.S. 35 (1910). All possible doubt as to the Constitutional validity of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases, has been firmly and conclusively overcome. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959).

Considerations of public policy arising from the character of appropriations for the public use, dictate that the presumption of necessity in favor of the utility is a fair one. As for example in the present case, the plaintiffs are engaged in a multi million dollar project to meet a public need. Time of completion of the project is of the utmost importance. Undue delay will not only cost the companies and ultimately the consumers a great deal of money, it could also result in future power shortages, not to mention the deterring effect which it may have on the utilities' willingness to invest great sums of money for the future needs of the people of Ohio, and the effect on the willingness of the public to invest their money in needed

public projects. This case has already caused a delay of more than a year and a half.

Surely, it can be presumed that the utilities do not carelessly or arbitrarily spend millions of dollars for unnecessary plants and equipment. Keeping in mind the utilities' years of experience and depth of professional talent, the Petitioners should be affirmatively required to show that the utilities have acted arbitrarily, capriciously or fraudulently in committing a massive amount of capital for the construction of Miami Fort 7 (the new power generating facility under construction) and this line. Chapter 163 of the Ohio Revised Code is a reasonable statutory plan to provide for competing interests of the condemning authorities in meeting people's needs and the interests of the property owners affected by the appropriations.

Petitioners' assert that sixty-one percent of the original route for this transmission line, as selected by Respondents, was defective because it was ultimately changed. This statement is misleading. Changes were made to the route not because the original route was defective, but solely as a result of two factors. First, representatives of Respondents checked personally with each and every property owner whose property would be crossed by the proposed route and thereafter attempted to accommodate the wishes of the property owners by investigating the changes they requested and initiating those which were feasible. Second, changes from the original route are always made because situations arise that could not be foreseen at the time the route was initially planned and investigated. Respondents maintain the necessary flexibility to ensure that future changes bring about the best possible route after all the right-of-way work is completed. The fact is that many changes are effected out of consideration for the interests of property owners.

The instant appropriations proceedings were concerned solely with the necessity to take *only two parcels of property* out of all the properties affected by the proposed route. Thus, any changes made up and down on the route which did not affect the two properties sought to be appropriated were completely irrelevant to this proceeding.

The opinion of the Ohio Court of Appeals focused upon and completely disposed of the property owners' argument on this issue as follows:

> "It should be kept in mind that we are here dealing with two statutory actions consolidated for trial. They are based on the eminent domain statute. They are not equity cases where broad equitable relief may be requested and granted. They do not constitute class actions. They deal only with two parcels of land out of a possible hundred or more parcels along the line. What the situation may be ten miles down or up the line from the parcels of these two owners is hardly cause for finding an abuse of discretion by the Agencies as to the defendants' land. As far as the court can determine from the record there is nothing to justify the trial court's finding of an abuse of discretion in routing the line over these two parcels.
>
> "The trial court emphasized that about sixty percent of the line was changed from the original. Much of this was to meet the objections of the property owners involved. Had the Agencies remained adamant and refused to make changes where possible they no doubt would have been severely criticized for not listening to the landowners and such intransigence would have been used to show the Agencies' lack of concern for the owners. We do not feel that this affected the defendants because the route was not changed over their property after the cases were filed.
>
> "The trial court in its opinion strayed far afield when it was pointed out that with all the changes it would still be necessary to cross defendant's land; and the

> trial court drew a parallel with the Criminal Search and Seizure law and said that this would prevent crossing defendants' land as Fruit of the poisoned tree. We fail to see the application of this reference to these cases." (Petitioners' brief, PP. 23a-24a).

THE PETITIONERS WERE ACCORDED DUE PROCESS IN THE APPROPRIATION PROCEEDINGS PRIOR TO THIS APPEAL.

Petitioners' reliance upon cases such as *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930), is not helpful to their argument.

In *Fuentes* v. *Shevin, supra,* 407 U.S. 67, the defendants had purchased some household goods for which they had made payments under conditional sales contracts. Thereafter, the goods were repossessed by the seller pursuant to the State replevin statutes by the simple expedient of authorizing the local deputy sheriff to physically seize the goods from the purchaser's home.

This Court declared the State replevin statutes to be unconstitutional on the ground that before the goods can be repossessed, the State must afford notice and a prior opportunity for a hearing to the purchaser. Thus, prejudgment deprivations were the only evils that the *Fuentes* Court had under consideration. The Court said,

> " (T) he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. 407 U.S. at 82.
>
> * * *
>
> "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of

> the basic right to a prior hearing of some kind." 407 U.S. at 86. (Emphasis added).

Likewise, in *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), this Court was only involved with deprivation of notice and a prior opportunity to be heard. There, a young girl was legally adopted by her step-father without any notice to her natural father or prior opportunity to be heard. The Court held that due process requires that before a father can be stripped of all legal relationship with his child, he must be given timely notice and a hearing. Obviously, neither of the above cases has any application whatever to the present appeal.

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra,* 281 U.S. 673, the plaintiff was alleging violations of the Fourteenth Amendment by intentional and systematic discrimination against a class of property owners caused by the way in which the State of Missouri determined property tax assessments. Nowhere in the State proceedings had plaintiff been afforded a hearing on the merits of the complaint. The holding of this Court under the facts of *Brinkerhoff* was that plaintiff could not be discriminatorily deprived of property without being afforded some procedural remedy for the resolution of the property owners' claims.

We have no quarrel with the holdings of any of the cases cited by the Petitioners. The simple fact is that the present case does not involve a notice or hearing problem. The organization of landowners who have supported and financed the Petitioners in this case received notice several years ago that CG&E planned to construct the line through Butler County. Mr. and Mrs. Nieman and Mr. and Mrs. Davies themselves had known since the fall of 1972 of such plans. After pre-trial discovery, they

were given a full opportunity at trial to present every fact they were able to muster to support their claims.

These people spent more than two years of trial preparation to litigate the issues that they had been publicizing in the Butler County, Ohio community for weeks and months prior to trial. They prevailed in the trial court notwithstanding the fact that *they failed to produce one scintilla of evidence to prove any of the specific issues which they raised in their complaint.* The trial court's ultimate decision against Respondents was based upon alleged procedural deficiencies, which procedures had never been required in the history of eminent domain in the State of Ohio or elsewhere. The only requirement for due process under the Fourteenth Amendment of the Constitution in condemnation proceedings, is that the landowner whose property is being taken for public use *be provided with adequate notice of the condemnation and a hearing to determine just compensation. Walker* v. *City of Hutchinson,* 352 U.S. 112, 115 (1956); *United States* v. *Miller,* 317 U.S. 369 (1943); *City of Oakland* v. *United States,* 124 F.2d 959 (9th Cir. 1942), *cert. denied* 316 U.S. 679 (1942)

Furthermore, Petitioners' arguments concerning the provisions for answer time and expedited trial under Chapter 163 are academic and not pertinent to this appeal (Petion, p. 24). The fact is that these provisions were not applied to Petitioners' case. Petitioners have continually overlooked the well-established principle that Courts will decide constitutional issues only when required by the facts of the particular case.

> "No rule of practice of [the Supreme] Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.' (citations omitted) In part, this principle is based

upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations." *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U.S. 1, 71-72 (1961).

"A court will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits." Syl. of *Greenhills Home Owners Corp.* v. *Village of Greenhills, et al.,* 5 Ohio St.2d 207, 215 N.E.2d 403 (1966).

More specifically, the courts will not pass on the constitutional validity of separate clauses of a statute, such as the property owners urge this Court to do, unless the particular mandate of each separate clause has been applied to the party alleging injury. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 (1945). The obvious reason is that constitutional issues should not be decided as hypothetical questions. Only those persons who can show that they have been prejudiced by an enactment are entitled to contest its constitutionality. *Prentiss* v. *Dittmer,* 93 Ohio St. 314, 322-23, 112 N.E. 1021 (1916); *Strongsville* v. *McPhee,* 142 Ohio St. 534, 53 N.E.2d 522 (1944). Petitioners can show no such prejudice.

SUMMARY

Petitioners in this case have raised broad and complex issues to support one simple objective that they have maintained throughout; namely, to have the proposed transmission line moved from their property to other persons' property. The Sixth Circuit Court of Appeals in *Nashville I-40 Steering Committee* v. *Ellington,* 387 F.2d 179 (6th Cir. 1967), summarized the dilemma faced by public agencies in constructing public improvements as follows:

"It would be virtually impossible to select a route for an interstate highway through a congested metropolitan area without working hardships upon many citizens. Appellants suggest possible alternative routes which they contend would avoid the unfortunate economic consequences which the proposed route will impose upon the North Nashville area. Alternative routes undoubtedly would impose hardships upon others. The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges. The providing of just compensation to property owners falls within the purview of the laws of eminent domain." 387 F.2d at 185.

This case does not involve the constitutionality of a comprehensive statutory scheme, because many of the provisions of Chapter 163 under attack were not in fact applied to Petitioners and because the constitutionality of eminent domain proceedings has been well established by both this Court and the various State Supreme Courts. The Petitioners were given far more than ample means during pre-trial discovery by which they could gather evidence to attempt to prove their claims. As the opinion of the Court of Appeals discloses, the problem with the Petitioners' case is not caused by any alleged constitutional deficiencies in the Ohio statutes, but by a complete

lack of any evidence to support their claims, even though they were given a full opportunity to present such evidence.

The Ohio condemnation statutes as construed by the decision of the Ohio Court of Appeals effect a proper balance between the competing interests of appropriating authorities and property owners in providing for both discovery and a full trial on the merits, but, at the same time, requiring that they be accomplished within a reasonable amount of time under the circumstances.

Respondents respectively urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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